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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
EASTERN DIVISION

DAVID DAVIS,  
Plaintiff,  
vs. CASE NO.: 3:06cv544-WHA  
PHENIX CITY, ALABAMA, et al.,  
Defendants.

VOLUME IV  
\* \* \* \* \*  
JURY TRIAL PROCEEDINGS  
\* \* \* \* \*

BEFORE THE HONORABLE W. HAROLD ALBRITTON, UNITED  
STATES DISTRICT JUDGE, and a jury, at Opelika, Alabama, on  
Thursday, March 6, 2008, commencing at 9:10 a.m.

APPEARANCES:

FOR THE PLAINTIFF:	Mr. Douglas L. Steele Attorney at Law WOODLEY & MCGILLIVARY 1125 15th Street NW, Suite 400 Washington, D.C. 20005
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9 Proceedings reported stenographically;  
 transcript produced by computer.

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20 \* \* \* \* \*

21 (The following proceedings were heard before the Honorable  
 22 W. Harold Albritton, United States District Judge, and a  
 23 jury, at Opelika, Alabama, on Thursday, March 6, 2008,  
 24 commencing at 9:10 a.m.:)  
 25 (Call to Order of the Court)

1 THE COURT: Good morning, ladies and gentlemen.  
2 Welcome back.

3 All right. Mr. McKoon?

4 MR. MCKOON: Your Honor, at this time, the defendant  
5 would rest.

6 THE COURT: All right. The defendant rests. At this  
7 point, I'll call on the plaintiff for any rebuttal testimony.  
8 And I want to advise the jury -- and this is what's held us up a  
9 little bit this morning -- the plaintiff has a right to call a  
10 witness to rebut specific testimony that was given in the  
11 defendants' case. There's a witness they want to call who's not  
12 available, but the two sides have agreed that if she were here,  
13 what she'd testify to.

14 And so Mr. Steele?

15 MR. STEELE: Thank you, Your Honor. The parties have  
16 agreed that if the witness was present, she would testify that  
17 the Captain Boatner retirement dinner that the association held  
18 was held on January the 13th, 2005.

19 THE COURT: And that witness is?

20 MR. STEELE: That witness is Captain Anne Land, who you  
21 saw previously a couple days ago.

22 THE COURT: And the defendants have agreed that she  
23 would testify to that and also do not disagree that that would  
24 be correct.

25 MR. STEELE: Thank you, Your Honor.

1 THE COURT: Is that right, Mr. McKoon?

2 MR. MCKOON: Yes, sir, Your Honor. That's absolutely  
3 correct.

4 THE COURT: All right. With that, does the plaintiff  
5 rest?

6 MR. STEELE: The plaintiff also rests, sir.

7 THE COURT: This puts the case in a posture that's  
8 going to be a little inconvenient for you-all, and I regret it,  
9 but that's -- there's no way to avoid it. With no other  
10 witnesses having been called and that putting the -- ending the  
11 testimony in the case, it's not going to be possible for us to  
12 go straight into it right now and have the case argued and  
13 turned over to you. There's got to be some time for me to meet  
14 with the lawyers and go over the instructions to be given you  
15 based on the state of the evidence now, now knowing what all the  
16 evidence is here, and also to resolve just what questions you're  
17 going to be asked to answer. So we're going to have to wait  
18 until the first part of the afternoon to have you come back.  
19 I'm going to -- I'm going to ask you to come back at one o'clock  
20 this afternoon. We'll have it put together by then.

21 What will happen after you come back, there will be no  
22 more testimony. The lawyers will make their closing argument to  
23 you. When they get through, I will instruct you on what the law  
24 is. I will give you copies of the forms that you're going to be  
25 asked to fill out answering specific questions, and then we'll

1 let you retire to the jury room. I'm sorry that we can't get  
2 right into it this morning. I hope you'll be able to find some  
3 way to use your time between now and one o'clock; but if you'd  
4 like, the jury room is available to you. And we'll have -- I  
5 guess it still has water and soft drinks in it.

6 I'll ask you to be back in the jury room in time to  
7 start this trial back at one o'clock. All the evidence is in  
8 now, and so I'll remind you not to begin discussing this case  
9 with each other yet. Listen to the argument of counsel and  
10 listen to my instructions on what the law is before you do  
11 that. And don't talk to anybody else or let anybody talk to you  
12 or in your presence. And I'll see you back at one o'clock this  
13 afternoon.

14 (Jury out at 9:14 a.m.)

15 THE COURT: All right. We'll be in recess. And  
16 counsel, if you'll just hold on here, I'll get something out to  
17 you shortly.

18 MR. STEELE: Thank you.

19 MR. MCKOON: Thank you, Your Honor.

20 THE COURT: Oh, yes. Let me call court back. Elna  
21 call court back to order.

22 THE CLERK: Excuse me. Court is back in session,  
23 please.

24 THE COURT: I neglected to take up motions at this time  
25 at the conclusion of the evidence. Mr. Steele?

1 MR. STEELE: Your Honor, I would like to renew the  
2 motion made yesterday for judgment as a matter of law.

3 THE COURT: On the entire case?

4 MR. STEELE: On the entire case, Your Honor.

5 THE COURT: All right. I deny that motion. Do you  
6 have a separate motion as to the issue?

7 MR. STEELE: I do, Your Honor. The separate motion is  
8 a motion for judgment as a matter of law with respect to the  
9 substantial and motivating factor portion of the *Pickering*  
10 test. We believe that the evidence that's come in, even though  
11 witnesses have testified to multiple motivations, that the  
12 documentary evidence as well as the testimony of every witness,  
13 including Chief Hunter, was very clear that the straw that broke  
14 the camel's back on this was indeed the phone call made to Mayor  
15 Hardin.

16 THE COURT: Mr. McKoon, do you have any response to  
17 that?

18 MR. MCKOON: Judge, just the state of the evidence as  
19 it is, that the form itself says that he's fired for a group II  
20 violation -- second group II violation. That would be our  
21 response to that. We believe that while that -- the firing and  
22 the reason that he was actually brought in and written up was  
23 because of the phone call, that the fact that he was fired was  
24 part of the progressive discipline process of the merit system  
25 and that, therefore, we can agree that that's a substantial

1 motivating factor. That's all I would say.

2 THE COURT: All right. The state of the evidence is  
3 that he would not have been fired except for that speech. There  
4 were other reasons also. He would have been disciplined, but he  
5 wouldn't have been fired. I understand the argument that's made  
6 by defense counsel that the results of the termination would  
7 have been -- would have been the same, but he wouldn't have  
8 been -- he wouldn't have been disciplined at all if he hadn't  
9 made the call. So I think it's clear that the substantial  
10 motivating factor was that he made the call. I don't see any  
11 way around that. I grant the motion.

12 MR. STEELE: Thank you, Your Honor.

13 THE COURT: Judgment as a matter of law on the issue  
14 that the telephone call was a substantial or motivating factor  
15 in termination.

16 Did you have any motions?

17 MR. MCKOON: Judge, I do. We have a motion for  
18 judgment as a matter of law also, which we just state for the  
19 record. We have filed a written motion now, and the Court can  
20 consider it at some later time or now if you want to. You know  
21 what the state of the evidence is at this current time. So I  
22 just filed a -- just say that we would move for judgment as a  
23 matter of law on behalf of the defendant.

24 THE COURT: I deny the motion.

25 MR. MCKOON: I have a second motion, and the second

1 motion would be that the Court find as a matter of law that ASOP  
2 12 applies whether a firefighter is on or off duty. And the  
3 reason we say that is we agree with -- well, let me put it this  
4 way. We think that the -- that the Court can view this as a  
5 contractual matter and that ASOP 12, in my mind -- and I think  
6 the state of the evidence would be -- would basically be  
7 meaningless if a firefighter could violate it just because he's  
8 off duty. To say that -- in this particular kind of speech,  
9 which is speech to the city council, in the environment in which  
10 we find ourselves, which we have a public safety department, a  
11 paramilitary organization which has a heightened interest in  
12 harmony and discipline and loyalty in the department has an  
13 absolute right to restrict speech up to a point. And to say  
14 that ASOP 12 would only apply on duty would make the policy  
15 meaningless. And so we think that the Court can decide as a  
16 matter of law that ASOP 12 applies both on and off duty. And so  
17 we would make that motion.

18 THE COURT: I'm going to reserve ruling on that.  
19 That's in the nature of what we've been talking about. I'm  
20 inclined to agree with the plaintiff's position at this time  
21 that there's room there for a factual determination by the jury  
22 with both sides arguing that in one form or another. But let me  
23 get back and look at these questions that you-all have submitted  
24 and think about that, and then I'll make a ruling on it. I  
25 understand your -- is there anything other than what you've told



1 me before as to your -- well, you've cited me some cases.

2 MR. STEELE: Right. I've cited some cases. We haven't  
3 seen the motion. It was probably filed this morning, his  
4 renewed motion, so I don't know what is contained in that.

5 In addition to the cases cited, I would also call the  
6 Court's attention to the fact that this was speech to a public  
7 official on a matter that he would be voting on. And the merit  
8 system rules established and enacted by the city council clearly  
9 and explicitly preserve the rights of their employees to engage  
10 in political activity -- and we view this as a form of political  
11 activity -- as long as they're doing it off duty. And what that  
12 means is that the city council has recognized and actually  
13 incorporated into the rules that govern all employees -- and  
14 City Manager Roberts said very clearly, including the fire  
15 department -- they've incorporated that -- the concept that's  
16 represented in one of the cases that I cited to you this morning  
17 that there is a distinction between on duty and off duty for the  
18 employees of the city. And Chief Hunter, whatever his  
19 intentions are, he doesn't have the authority to overrule that  
20 principle that was contained in the merit system.

21 THE COURT: Let me make sure I understand the  
22 plaintiff's position on this. My understanding of it is that  
23 it's not the plaintiff's position that you think I ought to rule  
24 as a matter of law the other way from what the defendant asked  
25 me, but that you think this is an issue to submit to the jury;

1 is that right?

2 MR. STEELE: Correct, Your Honor.

3 THE COURT: Okay. I'll take it -- yes.

4 MR. MCKOON: May I say just one other -- I'll be very  
5 brief, Judge. In the defendants' motion for judgment as a  
6 matter of law, we address this particular issue that we're  
7 talking about in paragraphs 13 and 14. Rather than just sitting  
8 here and reading that to the Court, I'll just give it to you for  
9 your consideration since you're going to rule on it a little  
10 while later.

11 THE COURT: When you say this, you're talking about off  
12 duty?

13 MR. MCKOON: Yes. Yes, sir.

14 THE COURT: After plaintiff's counsel has a chance to  
15 look at this and before I rule, if you have anything to say  
16 about it, I'll hear you.

17 MR. STEELE: Thank you. I appreciate that, Your Honor.

18 THE COURT: All right. We'll be in recess.

19 MR. MCKOON: Thank you, Your Honor.

20 (Recess at 9:23 a.m. until 9:48 p.m., at which time  
21 proceedings reconvened without the jury present, as  
22 follows:)

23 THE CLERK: Court is in session. You may be seated.

24 THE COURT: All right. On the defendants' motion for  
25 judgment as a matter of law on whether ASOP number 12 applies

1 off duty, I deny the motion. I've read the brief. The  
2 defendant has got two bases for asking for that. One is if the  
3 evidence clearly establishes that without controversy. I don't  
4 agree with that. And then second, that these regulations should  
5 be considered together as though they were a statute, should be  
6 considered under the statutory interpretation with a citation  
7 for that.

8 But considering the evidence that's before me, I do not  
9 find evidence to establish that the merit system rules and  
10 regulations and ASOP 12 were promulgated under any legislative  
11 act making them binding as if they were statutes. I don't find  
12 the statutory interpretation rule that applies to statutes to be  
13 applicable in this case. So I'm going to let this go to the  
14 jury. I'm going to -- and I do deny that motion.

15 I've got a form that I'm going to give counsel in a  
16 minute to look over that's my thinking now about the  
17 interrogatories after the conference that we had earlier,  
18 which -- and with my ruling based on substantial and motivating  
19 factor, I've left that out. I've put in a finding as to the  
20 telephone call being a violation of ASOP 12 along the lines that  
21 we discussed. I'm not holding you to it, but I understand both  
22 sides felt comfortable with that.

23 I've put other -- I've put other questions in a form  
24 that appears to me to be appropriate to allow the jury to  
25 find -- to find damages under certain circumstances, but

1 allowing that if they find all of certain questions in a way  
2 that would be favorable to the defendant, that they don't get to  
3 the damages issue. I think that it's -- I've got to either  
4 charge them that way or I've got to charge them in a way that  
5 tells them there's something left to be done by the Court and  
6 that this damages may turn out to be just an advisory issue.  
7 And I'm persuaded by what plaintiff said, that that may be  
8 confusing to the jury and possibly prejudicial to the  
9 plaintiff. But I think giving them a verdict form or the  
10 interrogatories that require them to return a verdict with an  
11 issue of damages without saying there's some way we don't do  
12 that is prejudicial to the defendant. I think this resolves it  
13 both. But I'm going to pass these out to counsel and give y'all  
14 an opportunity to look at them. We'll get together back in the  
15 robing room as soon as you're ready. We're in recess.

16 (Recess at 9:52 a.m. until 12:30 p.m., at which time  
17 proceedings reconvened in chambers without the jury  
18 present, as follows:)

19 THE COURT: All right. I wanted to go on the record on  
20 this about the order of closing argument. Then we'll talk about  
21 the jury instructions, how we need it to be. But let me say for  
22 the record that the issue has come up as to the order of closing  
23 in this case because the questions that are going to be answered  
24 by the jury apply only to defenses by the defendant except for  
25 damages. And the defendant has requested that the order of

1 closing argument be that the defendant, having the burden of  
2 proof on everything except damages, go first and the plaintiff  
3 come in the middle and the defendant close. I've asked the  
4 lawyers to see what law they could find during the lunch or  
5 no-lunch period, and I've been doing the same thing. And so  
6 since the request was made from the defendant, I'll ask them to  
7 speak first.

8 MR. MCKOON: Judge, it just looks like to me that  
9 the -- the law seems to be -- we found an Eleventh Circuit case,  
10 which is *Martin* -- excuse me. A Fifth Circuit case -- I  
11 apologize. *Martin versus Chesebrough-Pond's*, and it looks like  
12 it's 614 F.2d 498, which seems to hold that this is in the sound  
13 discretion of the Court. It says, Normally the party with the  
14 burden of proof has a right to open and close. Where, however,  
15 several defendants plead over against each other, the order of  
16 their arguments as among themselves rests within the sound  
17 discretion of the Court. It's not exactly on point, but it does  
18 seem to say that.

19 THE COURT: Let me save us some time because I -- I  
20 haven't seen that case, but I've seen some others to similar  
21 effect. And let me just hear from the plaintiff.

22 MR. STEELE: From what we've been able to determine in  
23 the short period of time, it does appear to be a matter that's  
24 within the Court's discretion. And I don't disagree with  
25 anything Mr. McKoon said on that. We weren't able to find

1 examples that we could give you that would give you guidance in  
2 one direction or another. If they're out there, we didn't come  
3 across them. But I have to agree with what Mr. McKoon said,  
4 that it rests with your discretion.

5 THE COURT: Okay. Some of the cases I've looked at,  
6 one is the *U.S. versus 2,353.28 Acres of Land*. It's a Fifth  
7 Circuit case in 1969, 414 F.2d 965. It is for the general  
8 proposition we're talking about. It says -- in the context of  
9 saying that it's within the discretion, it says, We merely  
10 observe that traditional notions of fairness favor giving the  
11 privilege of opening and closing to the party who carries the  
12 burden of proof.

13 There's -- I've found a Seventh Circuit case in 1992,  
14 *Moylan, M-O-Y-L-A-N, versus The Meadow Club*, 979 F.2d 1246, in  
15 which the question of reversing the summations came up and the  
16 district judge did reverse summations. And they say, Moylan  
17 argues that the district court erred in reversing the order of  
18 summations. It is customary for the party bearing the burden of  
19 proof to open and close the argument. That party is usually the  
20 plaintiff, but in this case the district court allowed the  
21 defendant to argue first and last, since the only remaining  
22 issue at closing was the affirmative defense. And there was no  
23 error there. That case did not involve an issue of damages  
24 because they had been stipulated to. So we've got a little  
25 different situation here.

1           An old Fifth Circuit case but not binding because it  
2 was -- it was December 2nd, '81, and was a Texas case is *Moreau*,  
3 M-O-R-E-A-U, *versus Oppenheim*, O-P-P-E-N-H-E-I-M, 663 F.2d 1300  
4 at 1311. And there was an objection to the realignment of the  
5 parties and not allowing the plaintiff to open and close. And  
6 they simply point out that it's not a subject of error, being  
7 discretionary.

8           There's a recent case that was just noted from a  
9 district court case in Texas, Southern District of Texas, *Reyes*,  
10 R-E-Y-E-S, *versus Texas Ezpawn*, E-Z-P-A-W-N, 2000 Westlaw  
11 3143315, in which the district judge there held that the  
12 burden -- the plaintiff's burden of proof was met, and so the  
13 burden shifted to the defendant to prove the defense. In this  
14 case, there was also some issue of damages. The Court realigned  
15 the case for argument and held that the predominant issue  
16 remaining was an affirmative defense. And so he, citing this  
17 Seventh Circuit case, reversed the order of summations totally.  
18 And even though there was an issue of damages, he allowed the  
19 defendant to open, defendant to close, and plaintiff to come in  
20 the middle because he said it predominantly involved the issue  
21 of liability.

22           So clearly, I think the thing -- the thing for me to  
23 decide is what's fair, considering the burden of proof. And the  
24 suggestion that I mentioned earlier seems reasonable and fair to  
25 me; that is, to let the defendant open, having the burden of

1 proof on the defense, let the plaintiff then argue in response  
2 to that and argue damages for the first time, let the defendant  
3 come back and respond to both the liability issue and damages,  
4 and then let the plaintiff close, limited to damages. Does  
5 anybody want to get anything on the record about that?

6 MR. STEELE: Yes, Your Honor. A couple of things.  
7 We'd like to state for the record an objection so we can  
8 preserve that.

9 THE COURT: All right.

10 MR. STEELE: Because we believe that with the damage  
11 element still out there, that that gives us an ultimate burden  
12 of proof. I just wanted a clarification on the suggestion  
13 here. And I think you said this last time, but maybe not this  
14 time, that when the defendants open first, they would be opening  
15 on everything except for damages; is that correct?

16 THE COURT: Correct.

17 MR. STEELE: Here's the concern that I have. And maybe  
18 there's a way of the Court giving an instruction to the jury so  
19 that they'll understand what's going on. The defendant has the  
20 responsive argument and gets to argue not only damages, but  
21 facts and the merits of the case. And if we, then, come up in a  
22 rebuttal and only talk about damages, I think that leaves a  
23 question to the jury over whether we just accept what Mr. McKoon  
24 said in his and why aren't we saying this or why aren't we  
25 saying that. So I think that if the Court's going to adopt this



1 structure, it would really be necessary to inform the jury that  
2 under the structure the Court has established, that our rebuttal  
3 is limited to that item and that they should not draw any  
4 inferences from -- from that limitation.

5 THE COURT: I think that's reasonable. I don't think  
6 it's necessary -- and I don't think anybody is asking for it --  
7 for me to talk to them about the -- ahead of time, before  
8 closing arguments, about who's going to go first and then what  
9 and all that. You're not asking for that. You're just asking  
10 when you get up to respond on damages, that I tell them I've  
11 limited you to speaking only about damages. Don't take that to  
12 mean that you wouldn't like to talk about the other parts, but  
13 you're limited to talking about damages.

14 MR. STEELE: That would be fine.

15 THE COURT: Is that what you're asking for?

16 MR. STEELE: Yes.

17 THE COURT: Do y'all agree with that?

18 MR. MCKOON: Yes, sir.

19 THE COURT: That's fine. Your objection is overruled.

20 Thank you, Risa. We'll talk about the other things off  
21 the record.

22 (Chambers conference concluded at 12:42 p.m., after which,  
23 at 1:14 p.m., proceedings reconvened in open court without  
24 the jury present, as follows:)

25 THE CLERK: Court is in session. You may be seated.

1           THE COURT: Okay. We've discussed this off the record,  
2 but I want to put this on the record, that all of the exhibits,  
3 all the documents that have been given to the courtroom deputy  
4 in the black book for the plaintiff and white book for the  
5 defendant are offered by the parties and are admitted in  
6 evidence. Is that correct, plaintiff?

7           MR. STEELE: Correct, Judge.

8           THE COURT: Both sides?

9           MR. MCKOON: Yes, sir.

10          THE COURT: Also, copies of those were prepared by the  
11 lawyers and have been in the jury box with the jurors. And it's  
12 by agreement of the parties and my agreement also that those  
13 books can go back to the jury room with the jurors. Is that  
14 correct for both parties?

15          MR. STEELE: Yes, sir.

16          MR. MCKOON: Yes, Your Honor.

17          THE COURT: All right. Now, are both sides okay with  
18 the full Court's instructions now that they've been delivered?

19          MR. STEELE: Yes, Your Honor.

20          THE COURT: Plaintiff and --

21          MR. MCKOON: Defendant is satisfied.

22          THE COURT: All right. Let's bring in the jury.

23          (Jury in at 1:15 p.m.)

24          THE COURT: Be seated.

25          All right. Ladies and gentlemen, all the evidence is

1 in. It's now time for the lawyers to speak to you in closing  
2 argument. When they finish, I'll give you the Court's  
3 instructions on the law, and then the case will be put in your  
4 hands and you'll retire to the jury room. The defendant will go  
5 first.

6 Mr. McKoon.

7 MR. MCKOON: Yes, sir. If it please the Court, ladies  
8 and gentlemen of the jury, I want to start off by thanking you  
9 for being so attentive in this case. This is the time in the  
10 case when I get to talk to you about what I believe the evidence  
11 has shown. But what I say the evidence has shown doesn't  
12 matter; it's what you think it's shown. Usually I'm real  
13 nervous when I get up in front of people in closing argument;  
14 for some reason, today I'm kind of eerily calm about this.

15 It's going to take me a few minutes to go through some  
16 things with you; but I think as we go through them, you're going  
17 to see what's going on in this case. I will tell you that this  
18 is a little bit different than the typical case where you go  
19 back and find for the plaintiff or the defendant. What you're  
20 going to be doing in this case is you're going to be answering a  
21 series of questions that the Court is going to pose to you. And  
22 the defendant bears the burden of proof on these questions.  
23 That means we must prove these things to you.

24 And I like to think of myself as kind of a no-nonsense  
25 person and getting to the point, so I'm going to try to get to

1 the point real quick of just what the questions are. And I'm  
2 going to go over them again with you before we get through. But  
3 questions you're going to be asked is you find by a  
4 preponderance of the evidence that the defendants have proved  
5 that the plaintiff's -- Mr. Davis -- telephone call to Mayor  
6 Hardin was a violation of ASOP 12. That's one of the questions  
7 you'll have to answer. Was that call -- did it violate ASOP 12.

8           The second question is that the defendants have  
9 proved -- meaning the city and the defendants sitting over here,  
10 Mr. Roberts and Mr. Hunter -- that -- have we proved that under  
11 the policies and practices of the Phenix City, a firefighter,  
12 after exhausting the chain of command in the Phenix City Fire  
13 Department, could speak without obtaining prior permission to  
14 the following: the city council, Mayor Hardin and other city  
15 council members individually, or the media. And there's a place  
16 to answer those questions yes or no.

17           The next question -- and we think it should be your  
18 last question that you have to answer -- is that the defendants  
19 have proved that the telephone conversation between the  
20 plaintiff and Mayor Hardin concerning the proposed ordinance to  
21 extend probationary period for new firefighters disrupted or  
22 impeded the operations of the Phenix City Fire Department or had  
23 a reasonable likelihood of disrupting or impeding those  
24 operations. We think you should answer yes to all of those  
25 questions. And if you do, that will end this case.

1           Now, I want to talk for just a moment about what I  
2 believe is important in this case from the standpoint of how you  
3 should consider it, and that is this. Everybody in the world --  
4 in the United States feels like they have a right to free  
5 speech, and we do. We all have a right to free speech. There's  
6 a gentleman sitting right over here that's actually put his life  
7 on the line before for that right, and I bet there's some of you  
8 that might have done that. And so it's an important right, and  
9 I think it is important.

10           At the same time, if you're in a paramilitary  
11 organization like a fire department or police department, you  
12 give up just a little of that right. And that means that the  
13 person that you're working for, your employer, can put a  
14 reasonable restriction on that right. And that reasonable  
15 restriction is so that there's not chaos in the operations of  
16 public safety departments.

17           Imagine what could happen if every time a police  
18 officer or a firefighter was disgruntled about something he  
19 could call a press conference about it and start talking about  
20 it before he ever took it up the chain of command. You can't  
21 run -- as my daddy used to say, that's no way to run a  
22 railroad. You just can't run a department like that. All we  
23 have asked Mr. Davis to do is comply with what we feel like is a  
24 reasonable policy, a very reasonable policy. And he was asked  
25 to do it time and again, and he broke it time and again.

1           The thing you have to think about in this case, I  
2 think, or any case you consider, is you have to look at the  
3 truthfulness, the truthfulness, of the plaintiff's claim. And  
4 you -- the Judge is going to tell you at the end of this case  
5 that you have to look at the credibility of witnesses. You have  
6 to size them up and say, were they truthful with me or were they  
7 not truthful with me.

8           Now, here's what this case is really about. It's about  
9 who's going to run the fire department of Phenix City. Is the  
10 chief going to get the chance to run this department and run it  
11 correctly, or is some gang of folks going to go off to the side  
12 and decide what they want to do and run the department? That's  
13 what this case is really about. And I'm fixing to show you the  
14 evidence that points you in that direction.

15           I want you, if you would, to look at your white exhibit  
16 book. And I want to go to -- and I'm going to try to go through  
17 this kind of chronologically. Go to Exhibit #1 real quick,  
18 March the 15th, 2005, and I'll just tell you what that is. That  
19 is a letter from Mr. Roberts to Mr. Malone seated here who's  
20 been here every day all week in this case. He's a union guy.  
21 And he and Mr. Davis are union buddies, okay? Nothing wrong  
22 with that. I'm not anti-union.

23           But what this is about is they have made a complaint  
24 involving the previous fire chief, Chief Prater, about a meeting  
25 they had with him, and they didn't like that meeting. And so

1 they sent a letter to Mr. Roberts saying who -- who can we talk  
2 to in your department if we want to talk to somebody? Who can  
3 we talk to over there in Phenix City? And so Mr. Malone sent  
4 the letter as the field representative of the union, and  
5 Mr. Roberts responded to him and said come to me. Any union  
6 member or official can come see me if they've got a problem.  
7 That's what that was about.

8           Now, say, well, y'all didn't copy Mr. Davis on that.  
9 And that's going to be part of the whole theme of this case.  
10 Everything in this case is supposed to be the city's  
11 responsibility or Chief Hunter's responsibility or Mr. Roberts'  
12 responsibility. Where is Mr. Davis's responsibility? Where is  
13 his responsibility? Where is Mr. Malone's responsibility?  
14 Isn't he supposed to pass that letter along? He's the one  
15 making the complaint. So in addition to having a right to go up  
16 the chain of command, if you would, we gave Mr. Davis over here  
17 kind of a super right. We let him go straight to the city  
18 manager if he wanted to. He never took that chance. That's in  
19 March.

20           Then what happens is in August -- and we went into this  
21 in a very limited fashion, but you've seen this exhibit many  
22 times. I believe it's Exhibit #17 in your -- in that white  
23 book. But if you just start chronologically and you look here,  
24 first of all, you see the reference to that letter to  
25 Mr. Malone. And the reason it's on there is because it's not a

1 violation of the merit system. It's to show that he -- that  
2 Mr. Davis knew or should have known that he could have gone to  
3 Mr. Roberts with any problem that he had.

4           And, you know, it's kind of a funny thing about this  
5 case, and I have to mention it now. But we've been given the  
6 burden of proving that if he had done these things -- if he had  
7 done these things, he could have gotten to the city council or  
8 gotten to the media. Why do we have that burden? Because he  
9 never did them. He never tried them, you know. It seems like  
10 to me the burden ought to be on him to at least try to follow  
11 the procedure before you say people are silencing me. Go up the  
12 chain. That's what you're supposed to do.

13           Now, let's go to the next thing. This was the offense  
14 that helped to get him terminated. It is a group II written  
15 warning, line -- for threatening, intimidating, coercing or  
16 interfering with a fellow employee or supervisor, including  
17 abusive language. Now, we didn't go into all the details of  
18 that episode and I can't today, but I'm going to tell you that  
19 that's the first offense for which he really tied into this  
20 later offense that got him dismissed.

21           The next thing is -- it's in August 3rd of 2005. So  
22 he's counseled for that, written up for it, given a group II  
23 discipline for it, not fired. And then on August the 22nd when  
24 Mr. Davis is in charge of somebody, he orders a firefighter to  
25 do 25 push-ups for forgetting his uniform shirt when he had no



1 authority to do that. He said, okay, give me 25. He didn't  
2 have any authority to do that. Not supposed to do that. It's  
3 not in the merit system. But that's what he did.

4 So that leads us to the September incident. And I want  
5 to talk about that at some length, maybe five minutes or so.  
6 When we get around to this media incident in September -- and  
7 let's go back just a minute. Chief Hunter, this man over  
8 here -- to all the people that came in here, I said, is this man  
9 fair with you? Yes, he's been fair with me.

10 He is a fair man. I'm proud to be here with Wallace  
11 Hunter. And whatever you do with this case, I'll still be proud  
12 to be with him. He is about -- he puts up with more than I  
13 could ever put up with. And I'm fixing to show you why.

14 When you -- when they went to this meeting, Mr. Davis  
15 was disingenuous with you about what happened. He got up here  
16 and said I -- a reporter called me because he heard there were  
17 some problems over in the fire department. Now, isn't it  
18 interesting that those problems come right on the heels of him  
19 being disciplined in August? He's disciplined on August the  
20 3rd, and he doesn't like that, and again on August the 22nd. So  
21 on September the 20th or right around September the 16th, I  
22 think it is, that newspaper article appears. And he says, oh,  
23 okay, you know, this reporter just called me out of thin air and  
24 wanted to know if he could come over there and meet with us, and  
25 I allowed him to do so. I didn't invite him. He just showed

1 up. And we got to the meeting; we all talked. And what I put  
2 in the paper was I was afraid to talk. He's talking to a  
3 newspaper reporter, but he's afraid to talk. And then he said,  
4 and they took my picture for the thing, but I didn't think they  
5 was going to put my picture in the paper. Now, isn't that  
6 silly? Isn't that silly?

7 Turn to Exhibit #4, if you would, for just a moment.  
8 There should be a series of statements in there. Do you see  
9 those? Let's start with the last one, which is 10(h). It's a  
10 statement -- all of these are statements by the union people  
11 that attended the meeting, okay? It says on Tuesday, August the  
12 13th -- I think it should have been September the 13th, but  
13 anyway -- I, James Marcus Wells attended a Phenix City  
14 Firefighter Association meeting. I arrived around 1820 hours  
15 and the meeting -- the meeting had already started. Next line.  
16 The meeting was called in reference to the association talking  
17 to the representative of the *Columbus Ledger-Enquirer* about how  
18 people felt about the way the fire department. While sitting at  
19 the meeting -- and he tells who all was there. While sitting at  
20 this meeting, a motion was raised to talk to the media.

21 Well, that was the reason for coming to the meeting.

22 I disagreed with this and stated -- Sergeant Davis was  
23 set on everybody speaking. I also observed other individuals in  
24 this meeting stating the same thing, meaning they disagreed with  
25 it. I then felt this meeting was going to do nothing but make

1 problems worse in the department, relations between the  
2 association and the city government. I then left the meeting  
3 and did not make any statement to any media personnel. I don't  
4 know who spoke to the media during the meeting. I can only  
5 speak for myself. Too much embarrassment has been brought to  
6 the department by the actions of only a few.

7           And you can read through these other statements if you  
8 want to. Lance Wagner said I got out of there because I -- I  
9 didn't even want to be in the union anymore after this. If you  
10 look at 10(d) where he's talking, he says, however, I did not  
11 feel this to be a productive way to deal with any of the  
12 department's problems, and it has led me to withdraw from the  
13 association. And you can go through and read all of them if you  
14 want to.

15           You'll also notice in that same group of documents  
16 there are two things that you might want to look at. One is  
17 there's a statement in there -- let me see where that is -- by  
18 Firefighter Brannon Wilkinson, and it's handwritten. It is  
19 10(f). Do you see that? I, Firefighter Brannon Wilkinson, feel  
20 that though Sergeant David Davis -- through Sergeant David Davis  
21 and my friendship, Sergeant Davis has felt comfortable enough  
22 with me to say some things that have been offensive and  
23 abusive. In my judgment, I did not report this to Assistant  
24 Chief Johansen because I felt that it would eventually stop. I  
25 will not be badgered and pushed into doing things I feel in my

1 heart that are not correct -- the correct way to handle  
2 evaluations or problems. I feel there are problems in our  
3 department that need to be corrected. There are correct ways to  
4 fix these problems. Management and employees can work  
5 together -- can work -- excuse me -- these out through  
6 communication for the betterment of all.

7           And when he got his counseling form -- when Mr. Davis  
8 got his counseling form about this, on the form it says that he  
9 had been intimidating this firefighter. So here we've got  
10 threatening this lady, getting another fellow to do push-ups he  
11 wasn't supposed to do, and now he's trying to intimidate a  
12 firefighter.

13           Now, you know, these are not things you sit up here and  
14 say, well, you're just picking on Mr. Davis. I'm not picking on  
15 him. That's his record. That's his record. I didn't make  
16 these statements. I didn't know anything about these  
17 statements.

18           So here we go. And what does that tell you about this  
19 situation? Well, there are a lot of things that don't get in  
20 records. They're attitudinal things. They're the way you act  
21 around other people. When Roy Waters was brought into this  
22 situation, he did not know a soul over there in Phenix City, not  
23 anybody. Thirty-two years in the fire service -- there sits Roy  
24 right there -- chief the Columbus Fire Department. One of the  
25 best firefighters you'd ever meet. One of the best public

1 servants you'd ever meet. He comes in and tries to straighten  
2 things out in the department, and he's met with opposition.

3           The swap time that they had, you know, so you could --  
4 and like I said, it's a great job. I'm not -- I'm not  
5 diminishing firefighter roles at all. But, you know, when  
6 you're at the station, you're not -- it's not constantly working  
7 all the time. There's -- you know, there's some cooking that  
8 goes on. There's some TV watching that goes on. There's some  
9 sitting around the table that goes on. There's -- you can go  
10 out and wash your own car if you want to. I mean there's lots  
11 of things you can do while you're at the fire station. You get  
12 good pay. You work ten days out of 30, like I said. In  
13 addition to that, you can swap out with somebody if you want to  
14 in the Phenix City Fire Department. So if you don't want to  
15 work four days and you've got a shift coming up, you can get  
16 somebody else to come in and work for you and you can pay them  
17 back.

18           Well, at some point in time we had an insurance problem  
19 about that because somebody on the job didn't look like they  
20 were on the job when they had a claim when they got hurt because  
21 they didn't clock in because they swapped out with somebody  
22 else. So swap time was taken away for a while. And you  
23 remember what Chief Waters said. He said, well, you know, one  
24 of the things that happened when I was there, when I tried to  
25 talk with Mr. Davis, was we had a situation where Chief Hunter

1 had gone to bat for the department, gone back to Mr. Roberts and  
2 said we want to get swap time back. And they gave it back to  
3 them. And Mr. Roberts -- I mean Mr. Hunter comes in, is going  
4 to come in and announce it to everybody. It's going to be a big  
5 thing of celebration. And Mr. Davis sits there looking out the  
6 window the whole time. And the excuse -- and there's a pattern  
7 of excuse after excuse after excuse -- was that his mother was  
8 having surgery that day.

9           Well, I don't know whether she was or not, but he was  
10 at work. I don't know how serious it was, but he was at work.  
11 And in addition to that, what happens is he stands there, looks  
12 out the window the whole time after Chief Waters has said now,  
13 you know, y'all congratulate the chief on this; you know, let's  
14 have a little camaraderie about this. And he looks out the  
15 window and doesn't shake his hand when it's over with. So they  
16 call him in and say, you know, what was that all about; and he  
17 says, he's just doing his job. He should have done that for me  
18 anyway, you know. You say to yourself, what is that -- what  
19 kind of attitude does that reflect? So there's a lot of things  
20 goes on that doesn't get on a form like this, and they go on all  
21 the time.

22           And the problem is how many chances -- how many chances  
23 is Mr. Davis supposed to get? You know, you just come up the  
24 list here. I didn't start with this stuff about the truck  
25 backing up and all that stuff. That's just a -- I guess that

1 could happen to anybody. Everybody makes mistakes. These are  
2 intentional kinds of things. This thing done in September was  
3 an absolute intentional thing to try to disrupt the department  
4 and try to hurt the chief's authority over there.

5           Now, here we go again when it comes around to this  
6 business about what we're here about, this so-called five-minute  
7 phone call to the mayor. Remember you were told right from the  
8 beginning that's all this was about? That's just not true. It  
9 wasn't all that this was about. Was it the reason, the  
10 substantially motivating reason was -- yes. We admit that. Had  
11 he not made the phone call to the mayor, he probably wouldn't  
12 have been fired. But if he hadn't had the record he had, he  
13 wouldn't have been fired either. If this was his first  
14 violation and he made an innocent mistake about that, it would  
15 have been fine. This guy knows the rules better than anybody in  
16 the department. He's got a master's degree. He studies them.  
17 He knows exactly where he can push and push and push and push  
18 and does it all the time. And that's what's been going on in  
19 this case.

20           So when this finally happens, you know, the chief says,  
21 well -- I mean, you know, he was infuriated about it, and I  
22 don't blame him. It was, like, why do you want to do this?  
23 First of all, it was a nothing issue. Like Chief Waters told  
24 you yesterday, it didn't -- it was a nothing issue. And yet he  
25 has not been honest with you even about that because he gets up

1 there and he testifies -- and he testified in his deposition the  
2 same way, which was, listen, I was -- I knew it only applied to  
3 new hires.

4           Because he's got like three different things he's  
5 saying here. A, it only applied to new hires. And I was off  
6 duty, so I was acting as union president to go around everything  
7 to go up to the mayor, and so I didn't have to comply with the  
8 policy because, A, I was off duty. And, B, I was acting in a  
9 representative capacity, like a lobbyist, like Mr. Malone is,  
10 okay? That's one thing. And then the other thing he throws in  
11 is, oh, and by the way, Captain Bennett said it was all right.

12           Well, I'm thinking, well, why did you have to ask him  
13 if you didn't have to ask him, right? Why did you have to ask  
14 him if you didn't have to ask him? I mean which is it, you  
15 know? Is it I asked him and I followed the chain of command?  
16 Which Captain Bennett wouldn't have the authority to send  
17 anybody to the mayor, okay? That's just another way to say,  
18 okay, let's -- you know, if this doesn't work, maybe this will  
19 work.

20           That's just another excuse, because there's always an  
21 excuse, just like, you know, it's the city's responsibility,  
22 supposedly, to get up here and say, okay -- oh, we were supposed  
23 to give everybody a copy of the ordinance. That's what we're  
24 supposed to do. Well, everybody in the department knew about  
25 it. Only two people raised their hand, said is it going to



1 affect me. No, not going to affect you. Who -- where is the  
2 responsibility on the other side? Isn't it his job to find out  
3 about that if he's got a problem or an interest with it? He  
4 didn't have a problem with it.

5           Now, here's what he said, okay? Here's what he said.  
6 He says one time I knew everything there was to know about it,  
7 but he forgot about his personnel review board hearing  
8 testimony. And the only reason I brought it up was this, and  
9 the reason I played you the tapes with his words on it was  
10 because he said initially, you know, oh, I knew it was only for  
11 new hires. So that means now I'm off duty as a lobbyist for the  
12 firefighter people and I'm going around to the mayor, right?  
13 And I knew all about it. I knew that's all it applied to.

14           So then I asked him -- I didn't ask him. In fact, this  
15 is his lawyer asking him questions at the personnel review board  
16 hearing. And it's on tape. You heard it: And I said, well, I  
17 wasn't aware of that.

18           Let me go back up here.

19           And then I also told him -- this is his conversation  
20 with the mayor. We were against being put on probation after  
21 you were promoted, that an 18-month-long probation after you  
22 were promoted was a little long, that 12 months was adequate.  
23 And that's when he told me that the probation didn't affect  
24 people that were already employed, that it would be only -- only  
25 be new hirees. And I said, well, I wasn't aware of that. But

1 no matter what, I just want to let you know what our viewpoint  
2 is. We would be opposed to probation and so on.

3 And then his lawyer's next question was: So the mayor  
4 cleared up your confusion as to whether or not this proposal  
5 applied to new employees or all employees in general.

6 This is at the personnel review board hearing which,  
7 again -- you know, this is another little thing. You notice  
8 little things when you go through stuff. At the end of that  
9 white book you've got there, you'll see that when Mr. Davis  
10 asked the personnel review board hearing for his hearing,  
11 there's a time frame. Let me see which exhibit that is real  
12 quick. It's #19. There's a time frame in which the personnel  
13 review board must meet, okay? And they were to meet during that  
14 time frame, and he said, look, I can't -- I can't be there  
15 then. I've got other stuff I need to do. Would y'all please  
16 put it out past March the 12th? And we did. Just another  
17 chance for Mr. Davis. Another chance for Mr. Davis.

18 People came in here and testified in this case. The  
19 mayor told you -- and you're going to hear a lot about this  
20 stuff about, well, the mayor had an open-door policy, okay? The  
21 mayor is a politician who at the time he said that was running  
22 as a candidate for election. Then he goes to Todd Boatner's  
23 party, and they say he said it again. Well, we stipulated  
24 today -- that means agreed -- that Todd Boatner's party was  
25 January the 13th, 2005. Okay? Last contact with the mayor with

1 any of the union people, right?

2 When did he go to the newspaper? When did all that  
3 stuff happen? It was September. I've lost my board on it, but  
4 I can show it to you real quick. September the 20th, 2005. So  
5 on -- excuse me. Let's see. Go to #3, I guess. See if that  
6 helps us. No, that's just David's statement about giving the  
7 interview. Okay. It's #6. I apologize. #6 in the white book.

8 September 20th, 2005, is right after the newspaper  
9 article. So if there had been any confusion, any confusion  
10 about whether he could go to the mayor or needed to follow the  
11 policies, it was cleared up in September before this happened in  
12 April. And, you know, you-all have got jobs. You've all been  
13 working for people before. You go into a place, you know; if  
14 somebody called you in about something and said, now, look,  
15 here's the rule, don't do this again, and had you sign off on  
16 it, don't you think you would remember that? Don't you -- and  
17 wouldn't it at least raise a question in your mind if you  
18 started to violate the rule? You know, you'd say, wait a  
19 minute, I believe there was a rule about that. I was called in  
20 about it and I was talked to about it. Shouldn't I do something  
21 about it?

22 And again, why is it so important? Because if you keep  
23 going around people all the time, this man cannot run his  
24 department. And I'm going to tell you something. He did  
25 something pretty gutsy, in my opinion. When all this happened,

1 he issued -- he issued a memorandum to the city manager that  
2 basically said tell the mayor to butt out of my business.  
3 That's not his job. I understand the charter, and the charter  
4 is that the city manager is supposed to be running this. And  
5 I'm running this department, and nobody needs to be going around  
6 me and exerting -- you know, trying to go around my authority,  
7 because that's not the way the charter is written. And it's not  
8 the way it's written. And it's not -- it shouldn't work like  
9 that.

10 Mr. Davis knew all of this. He knew about the  
11 charter. He knew about the SOP. He knew about everything. And  
12 if you look at the SOP, it's just -- it's just real simple.  
13 This procedure shall be followed by all members of the Phenix  
14 City Fire Department.

15 Let me stop there just a minute. Is this thing any  
16 good if you can pick and choose whether you're off duty or on  
17 duty when you do it? Is it any good? Does it have any meaning  
18 at all if you're off duty and you say, oh, it doesn't apply when  
19 I'm off duty? I'll just wait till I'm off duty and go down and  
20 talk to the council about fire-department-related business.  
21 They can't do anything about me because I'm off duty now.

22 Well, if that's true, then we just need to tear it up  
23 and throw it away. And we need to get rid of the fire chief and  
24 we just need to have some kind of little manager there. And  
25 every time we want to do something, we need to take a vote.

1 What do y'all think? Let's call the 55 members of the fire  
2 department in in Phenix City. What do y'all think about this?  
3 We're going to vote and see if it suits all of y'all.

4 Are you going to do that, or are you going to run the  
5 department from the top down instead of the bottom up? Now, I  
6 don't know what you believe about that, and you're going to be  
7 the people in this case that's going to decide that. But I  
8 don't think you can run it that way. I don't think you can run  
9 it that way.

10 I want to talk about a few other things here in regard  
11 to this particular issue of fairness, I think, of fairness. And  
12 that is, think about just a minute, if you want to think about  
13 Chief Hunter over here, and whether he's some Nazi-type person  
14 that's trying to shut everybody up, which is what we've been  
15 accused of. Think about that. When Anne Land got up there --  
16 she's a captain now. If you look at that Exhibit #4, she's one  
17 of the people that was out there with this article. Nobody --  
18 nobody punished her other than came in and said, Ms. Land, here  
19 is the -- here's the rule now; please go by the rule. And  
20 attached to this, by the way, was the grievance -- parts of the  
21 grievance procedure and the ASOP.

22 THE CLERK: Five minutes.

23 MR. MCKOON: That's fine.

24 Same thing with Karl Taylorson. He's been made a  
25 captain since then. Nobody's retaliated against him or tried to

1 hold him down or do something terrible to him.

2           And I'm going to talk about one other thing real  
3 quickly, and that's this, about changing policies or changing  
4 directions or all that kind of stuff. This document, #17, which  
5 I showed you a minute ago, was created on April the 20th, 2006,  
6 right after all this happened with the phone call to Mayor  
7 Hardin. And down here on this document, it cites ASOP 12. We  
8 haven't changed our position on that since the day this  
9 happened. Nobody's tried to change it or say it was any  
10 different or anything.

11           And the ruling -- it's kind of confusing, because you  
12 go up the grievance procedure -- if I have a grievance about  
13 something and I take it up the chain to the city manager, his  
14 decision on it is final. I can't change his decision on it.  
15 But after that, if I want to go talk to anybody about it, I can  
16 go talk to them about it.

17           The ASOP is the same way in regard to the city  
18 council. If a problem can't be solved by anyone in the chain of  
19 command, then the city manager will arrange a hearing with city  
20 council, which is the same thing it says here. This is the same  
21 thing that was on this written warning form, was all he had to  
22 do, all he had to do.

23           And he went through this stuff about, oh, it would take  
24 22 days to get there. Roy Waters was there. Chief Hunter was  
25 there on the 17th. All he had to do was call them up, just go

1 straight up the chain. It would have probably taken him an  
2 hour, maybe, if that's what he wanted to do if it was some  
3 urgent matter.

4 The truth of the matter, it was not an urgent matter.  
5 The truth of the matter, he was not only calling on behalf of  
6 other people. The truth of the matter is he didn't call a bunch  
7 of other people. The truth of the matter is he decided this was  
8 something he was going to do, and that's exactly what he did.

9 I'm going to get a chance to come back up and talk to  
10 you again in a minute; and when I do, I'm going to talk to you a  
11 little about some of the witnesses that testified in this case.  
12 And at that time, I think you're going to see that this whole  
13 case is not about wrapping somebody in the flag and defending  
14 freedom. It's about somebody that got chance after chance after  
15 chance and then, finally, he ran out of chances. He knew the  
16 procedures and he violated the procedures. And I think we have  
17 to have those procedures, or we're not going to be able to run  
18 our department. How many people do you know that get written up  
19 this many times for something and keep their job? And these are  
20 not made-up things. There's been no contest about that.

21 I'll be back in a little while. Thank you.

22 THE COURT: Mr. Steele?

23 MR. STEELE: Thank you, Your Honor.

24 Your Honor, members of the jury, first let me begin by  
25 thanking you. I started on Monday by thanking you for your

1 service because it's the most important part of the case and  
2 it's the reason that we're here, and I wanted to thank you again  
3 for your service and the attention you've given us throughout  
4 this time.

5           At the beginning of this case, among other things, the  
6 Judge informed you that what Mr. McKoon says and what I say,  
7 that's not facts. That's just argument. The facts come in  
8 through the witness -- on the witness stand or facts come in  
9 through documents that are admitted in evidence. Now, the  
10 reason that I have to tell you that and the reason there's a  
11 rule on that is a closing argument like you just heard. You  
12 heard Mr. McKoon testifying about all sorts of things that  
13 didn't come into the case. He's testifying about Mr. Malone,  
14 who he apparently knows quite well. There's no testimony in the  
15 case about Mr. Malone and his relationship and who he is and all  
16 of that. He provided testimony that Chief Hunter and Chief  
17 Waters were at work on the 17th of April, 2006. There's no  
18 testimony about that. That's Mr. McKoon testifying.

19           When you retire to the jury room and have to reach a  
20 decision in this case, I'll ask you to do the same thing that  
21 the Court's going to ask you to do, and that's to make a  
22 determination based upon the facts that came in in evidence, not  
23 facts that Mr. McKoon tells you that you didn't actually hear  
24 from any witness. And if I say anything to you that you think  
25 you didn't hear from any witness, you shouldn't be relying on



1 that either.

2           Now, at the beginning of the case, as Mr. McKoon  
3 pointed out, I asked you to keep something in mind. And the  
4 first thing I told you was that the evidence was going to show  
5 that David Davis was terminated, was fired by the defendant as a  
6 result of a five-minute phone call to the mayor. And here we  
7 are, four days later, and where are we? The Court has  
8 determined as a matter of law that Mr. Davis's phone call to  
9 Mayor Hardin was a substantial or motivating reason for his  
10 termination. That's been determined by the Court already. I  
11 told you on Monday that that's what I would prove; on Thursday,  
12 the Court has already accepted that.

13           Now, here's another credibility item I'd like to raise  
14 with you. As I just told you, the Court has determined as a  
15 matter of law that the phone call was a substantial or  
16 motivating factor. Mr. McKoon just stood up there and said, you  
17 know what, we admit that it was a substantial or motivating  
18 factor. It's awfully easy to admit something after the Court  
19 has already ruled as a matter of law. But I bet when you were  
20 sitting there and you heard Mr. McKoon say that, you didn't  
21 think for a minute that it's because the Court already decided  
22 that issue. You thought that there was some generosity going on  
23 on the side of the defense. No such thing.

24           You also probably noticed -- and language matters.  
25 People can say things in certain ways to try to inflame passion,

1 right? Language matters. Yet you've heard Mr. McKoon refer to  
2 the labor association people as a gang. You used (sic) him  
3 throw around the term "Nazi," but you never heard anybody on our  
4 side say anything even close to that regarding the chief, but  
5 Mr. McKoon throws that term around. Why does he do that? He's  
6 hoping to distract you from the facts of this case and hope that  
7 you're going to decide the case on some other basis.

8           One more item before I get to more of the facts of the  
9 case, because I think you need to keep all this in mind. The  
10 Judge is going to instruct you as to the law of the case, and I  
11 ask you to pay careful attention to that because Mr. McKoon  
12 stood up here and said where is Mr. Davis's responsibility -- he  
13 even wanted to know what Mr. Malone's responsibility is, and he  
14 hasn't been a witness at all in the case -- and suggested to you  
15 that the burden ought to be on Mr. Davis. Well, guess what?  
16 The Judge will instruct you as to the law. And when you get to  
17 those instructions and you see those questions, they're going to  
18 tell you that the defendant has the burden of proof whether  
19 Mr. McKoon likes it or not.

20           Now, while we're at it, I guess we'll say this on the  
21 same topic. You have exhibit notebooks in front of you, and  
22 you're going to have a chance to review all the exhibits when  
23 you retire to the jury room. And Mr. McKoon entirely properly  
24 read some of the exhibits to you and read statements from a  
25 Mr. Wells or a Lance Wagner or Brannon Wilkinson. Did you

1 notice something, though? None of those people testified. You  
2 have no basis for judging the credibility of what those people  
3 said.

4 MR. MCKOON: Judge, excuse me. I'm going to object to  
5 that. He had every right to call anybody he wanted to.

6 MR. STEELE: Your Honor, I'm going to object to this  
7 interruption. This is fair closing argument, and Mr. McKoon is  
8 aware of it.

9 THE COURT: Yes. It's fair closing. Either side could  
10 have called the witnesses. But Mr. Steele is talking about the  
11 fact that they were not up here is something for you to judge as  
12 to whether this argument is credible. So I overrule the  
13 objection.

14 And don't take a minute off of Mr. Steele's time.

15 MR. STEELE: One of the issues that you're going to be  
16 called on to examine in this case is the issue of disruption.  
17 And here again, this is the time when you're going to have to  
18 follow the instructions, because what the instructions are going  
19 to ask you to determine is whether the phone call to the mayor  
20 on April 17th, 2006 -- whether that phone call either created  
21 tremendous disruption in the department or interruption of  
22 affairs or was likely to do so. It's not about a newspaper  
23 article. It's not about anything else. It's whether a  
24 five-minute phone call to the mayor was going to bring this  
25 department to its knees. That's what they're trying to tell

1 you. A phone call to the mayor was going to bring this  
2 department to its knees. There's no evidence to support that  
3 other than bald assertions on their side, but that's what they  
4 want you to believe in this case.

5 Now, who made those bald assertions about this is going  
6 to ruin the department if somebody can call the mayor when  
7 they're off duty? Who were they? Mr. Roberts, Chief Hunter,  
8 and Chief Waters. Who was responsible for the termination?  
9 Mr. Roberts, Chief Hunter, and Chief Waters. That may be why  
10 they're trying to tell you that there would be all sorts of  
11 chaos, to use Mr. McKoon's word, chaos, if they allowed  
12 firefighters when they're off duty to have a short phone call  
13 with the mayor. One thing I can tell you when the judge  
14 instructs you on the law of this case, the Judge is not going to  
15 tell you to leave your common sense behind when you enter the  
16 jury room. Common sense tells you that that five-minute phone  
17 call not only didn't cause disruption, it wasn't likely to cause  
18 disruption.

19 But since that's an element, let's talk a little bit  
20 about these different things that they have alleged were proof  
21 of disruption. First they talked about this newspaper article  
22 in September of 2005 and that that caused all sorts of morale  
23 problems and other problems and, gee, it's the worst thing that  
24 ever happened. What are the facts? The facts are that the  
25 newspaper article that's in your binder already discussed

1 problems with morale and the other problems in the department  
2 that preexisted the publication of the article. That's why the  
3 article was published.

4 Another fact. Chief Waters testified that when he got  
5 to the department in December of that year there were problems,  
6 but he described them as typical problems, not out of the  
7 ordinary for fire departments. What does that tell you? It  
8 tells you that the newspaper article didn't create the  
9 disruption; disruption created the newspaper article. And after  
10 it got published, things started to get better. But is proof of  
11 disruption so serious that this man should be deprived of his  
12 First Amendment rights? I don't think you're going to buy that.

13 The next issue that they offered in terms of statements  
14 of the disruption that they want you to consider -- and they had  
15 to come up with some concrete examples, right? So they want you  
16 to be able to say that there was disruption. Well, let's look  
17 at these concrete examples. Chief Waters offered a couple of  
18 them; Chief Hunter offered one of them. But let's examine them.

19 Chief Waters gave as an example of the disruption that  
20 they're laying to rest on Mr. Davis's shoulders that when he got  
21 to the department, people referred to each other by their last  
22 name. You know, I don't know what Chief Waters' experience is  
23 other than the fact that he doesn't know Alabama, and that was  
24 made clear in the cross-examination. But anybody who's been  
25 around a bunch of teenage boys or a bunch of grown men acting

1 like teenage boys knows that calling one another by their last  
2 name is not a big deal, certainly not something that you could  
3 deprive someone of their constitutional rights for.

4           Then you got to the other horrible, horrible thing that  
5 Mr. Davis did. He's accused of looking out the window.  
6 Somehow, he should not have constitutional rights because he  
7 looked out the window during a meeting. Well, let's think about  
8 this meeting for a minute. Chief Waters told you and Mr. Davis  
9 told you that they had a swap-time policy, they had it taken  
10 away from them, and then they had it given back. And for some  
11 reason, Chief Waters decided that when they got it back, they  
12 should have this meeting and everybody should go and you all  
13 should -- and he told the people this. You should all then go  
14 up and shake the chief's hand and thank him for it.

15           Now, I have no idea why Chief Waters thought that Chief  
16 Hunter needed to have his ego stroked in that way. I didn't get  
17 that impression from the chief when he testified. But these  
18 people have nothing better to do than to go around and create a  
19 ceremony and ask the people to have this spontaneous action of  
20 shaking hands and saying thank you? It's something they had  
21 taken away from them and got back. It's almost -- it's almost  
22 like you steal your neighbor's car and a year later you decide  
23 to give it back to him, and you're expecting to be congratulated  
24 for it. And yet they want you to believe that, you know, this  
25 department can't survive if David Davis is allowed to look out

1 the window.

2           And then they told you that after this meeting was  
3 over, the management, they all got together. And what did they  
4 say? Did you see that? David was looking out the window. I  
5 saw that. David was looking at the window. And they all had  
6 this big conflict about David looking out the window. Maybe  
7 there would be fewer problems in the department if they worried  
8 about real things and not whether Mr. Davis looked out the  
9 window or not. That's not disruption that's going to interfere  
10 with the department.

11           Then move on to that, they had another theory. They've  
12 got to have theories on what the disruption is, and this is an  
13 interesting one. It's really kind of a doozy. Here's the  
14 theory. Chief Hunter writes a memo to the city manager. For  
15 some reason, Chief Hunter -- now, remember, the chief, city  
16 manager, city council. Chief Hunter takes it upon himself to  
17 chastise the mayor and claim that he knows better than the mayor  
18 what the charter reads.

19           I'm not going to try to tell you who knows better what  
20 the charter reads, but the chief was chastising the mayor about  
21 it. And when the mayor found out about it, he took offense to  
22 that. And then the two of them acted like mature adults and  
23 stopped talking to one another for a while. And that's David  
24 Davis's fault? And he should not have free speech rights  
25 because the mayor and the chief decided they weren't going to

1 talk to each other for a while? That doesn't make sense either.

2           So then, you know, we get to a point where you're going  
3 to have questions about access to the media and access to the  
4 city council, and there's going to be a lot of interesting  
5 things that you need to keep in mind when you do that. Now,  
6 there's an exhibit in your notebooks that is the  
7 much-talked-about ASOP 12. You've seen it plenty of times, and  
8 I'm sure you're going to be talking about it later.

9           Well, according to the city's witnesses, ASOP 12  
10 prevents an employee from talking to the media without  
11 permission. When you retire to the jury room, take the time and  
12 read ASOP 12. It doesn't say one word about the media, not TV,  
13 not radio, not newspapers, nothing. It doesn't say anything  
14 about the media. And if you want a little more evidence that it  
15 doesn't apply to speaking to the media, what's the process  
16 here? According to ASOP 12, the process is you go through the  
17 steps and then what happens? The city manager will arrange a  
18 hearing with the city council. Now, I'll talk in a few minutes  
19 what I think that means. But wait a minute. I want to talk to  
20 the media, and the end result is I follow a policy and the city  
21 manager will arrange a hearing before the city council. That  
22 doesn't make sense. ASOP 12 has nothing to do with contacts to  
23 the media. It simply was an excuse to put some discipline on  
24 Mr. Davis. It's really utterly illogical for so many witnesses  
25 to stand up here and tell you that ASOP 12 regulated contact



1 with the media. It just didn't.

2 Now, what do you do with that? We know that ASOP 12  
3 doesn't address contact with the media, so what do we look at?  
4 We look at what people say when they were deposed in this case.  
5 And Chief Hunter was repeatedly asked questions about contact  
6 with the media. And we've got an example up here, and we talked  
7 about it some already, where we asked Chief Hunter some  
8 questions about access to the media. And what does he say?  
9 They still don't have the right. Said, if there's a problem, I  
10 can guarantee anyone that I try to do my best to resolve it.

11 Well, I appreciate the chief would try to do his best  
12 to resolve it, but he was pretty clear on that. They don't have  
13 a right to go to the media. And he was asked again. He had a  
14 chance to clarify it, whether they could go to the media, and he  
15 said they would violate that, but we've never had it happened.  
16 Given what you've learned about the operation of this fire  
17 department, are you surprised that they've never had it happen?  
18 There's no evidence in this case that any policy or procedure of  
19 the city allows individuals access to the media.

20 But we have another piece of evidence that deals with  
21 access to the media, and that was admitted as Exhibit #29 in the  
22 binder in front of you. And Exhibit #29 was a memorandum  
23 from -- to Chief Hunter from Chief Hanson talking about a verbal  
24 counseling with now-Sergeant Taylorson, who you met this week.  
25 And the last sentence of that -- that counseling says, I advised

1 him that the city would not put up with another episode of  
2 speaking to the media without prior approval. Chief Hunter, on  
3 the stand, agreed with me that -- he may not have worded it the  
4 same in terms of "put up with," but he agreed with me that the  
5 rest of the sentence was true, that the policy was that they  
6 weren't going to have people speaking to the media without prior  
7 approval.

8 But then the chief said -- he backed up a little bit  
9 and he said, well, "approval" doesn't really mean approval.  
10 "Approval" means you get to do it anyway even if I disapprove.  
11 That was the first really interesting definition that was  
12 presented to you this week but not the only interesting  
13 definition. But "approval" somehow -- and "prior approval" --  
14 they were clear on that. "Prior approval" somehow doesn't mean  
15 approval at all. You can't get that from the documents or the  
16 evidence that's before you. You just have to assume that  
17 somehow "approval," in the world that the officials are  
18 operating in this week, doesn't mean approval.

19 Then there's reference about this grievance process. I  
20 mean why was there discussions of the grievance process? This  
21 is why there's discussions of the grievance process, and I think  
22 you may have noticed this. When I pushed the witnesses with  
23 respect to ASOP 12, which doesn't say a word about the media and  
24 doesn't guarantee access to council members, I suddenly get an  
25 answer he should have take -- gone and taken a grievance.

1           And then I get the grievance policy out -- and that's  
2 in your notebook as well -- and I point out how it's this  
3 four-step complicated process, it could take up to 20-some days  
4 to be resolved. And the final step, you only get to the city  
5 manager. So what do they do with that? The city manager,  
6 according to the grievance policy, gets a final nonappealable  
7 decision. Guess what? They've told you "final nonappealable,"  
8 that doesn't mean what it sounds like either. Because once  
9 you're through this final nonappealable stage, you can do  
10 whatever you want, according to the testimony this week. That's  
11 not what the document says.

12           And then when you talk about that, they shift you back  
13 again and they would start talking about ASOP 12. And then  
14 in -- this is kind of a fun one. If it wasn't confused enough  
15 with them pointing at the grievance process, pointing at ASOP  
16 12, suddenly they start talking about a letter that was sent to  
17 Mr. Malone. According to that letter, chain of command doesn't  
18 matter a bit. You can go directly to the city manager. So  
19 we've got chain of command is very important. Chain of command  
20 is extremely important. You can't make a phone call to the  
21 mayor; that would ruin the chain of command. Then suddenly  
22 chain of command isn't all that important because if you have a  
23 concern, take it directly to Mr. Roberts.

24           There's not a piece of evidence before you that says  
25 David Davis ever received that memo. Any -- you know,

1 Mr. McKoon interrupted my closing to say, well, we could have  
2 called any witness we want. Fair enough. They could have  
3 called any witness they want, and they've got the burden of  
4 proof on this. The city manager's letter, he sent copies to the  
5 city council, to the city attorney, to personnel, to file. He  
6 didn't send one copy to any firefighter in Phenix City, and yet  
7 somehow that also is an excuse to deprive this man of his  
8 freedom of speech.

9 Now, in addition to access to the media -- and they've  
10 provided you no evidence that that's permissible; they wrote up  
11 people, said they wouldn't tolerate it. And the policy that  
12 they say, you know, provides for it doesn't say anything about  
13 the media. There's going to be a question before you about  
14 access to the city council. Would there be access to the city  
15 council or city council members had Mr. Davis gone through the  
16 chain of command?

17 And you've got, you know, good old ASOP 12. And ASOP  
18 12, you know, says you have to go through this step and then you  
19 go through this step. Then it has this phrase, then the city  
20 manager will arrange a hearing with the council. Now, that's a  
21 pretty vague phrase. What does that mean? The city manager  
22 will arrange a hearing with the council. Well, we don't have to  
23 guess what that means because Chief Hunter along with  
24 Mr. Roberts explained what that meant. Remember I had a long  
25 conversation with the chief about --

1           That's Mr. Roberts. I'm sorry. Let's get the right  
2 one in front of you.

3           We had this conversation with Chief Roberts about  
4 contact with the city council. And this is, you know, an  
5 excerpt of his deposition transcript that he said was the truth  
6 when he gave it under oath. And here he was very clear about  
7 whether firefighters have a right to get to the council without  
8 prior approval. It's -- he said ASOP 12 concerns getting to the  
9 council as a body. This was written in '98 -- I'm not sure why  
10 he said that -- but I guess is trying to get there, the body,  
11 which is a place you would never get because it stops at the  
12 city manager. A place you would never get because it stops at  
13 the city manager.

14           Chief Hunter told you, in essence -- you know, I asked  
15 him; I didn't expect he'd agree with me. I said, is this one of  
16 those never-say-never situations that "never" doesn't really  
17 mean what you say? When I asked him if it was a never-say-never  
18 situation, he kind of agreed with me on that. And then we find  
19 out that "stop" doesn't necessarily mean stop. "Stop"  
20 apparently means slow down. But there's no way of reconciling  
21 that answer if you use your common sense. There's no way of  
22 rationalizing or connecting that answer to what they're telling  
23 you now, that there's a right to get to the council.

24           And, you know, what about Mr. Roberts? Mr. Roberts is  
25 the one that's supposed to arrange this hearing, this vague --

1 arrange this hearing. This is what Mr. Roberts says that  
2 means. They can come through the -- to the council through  
3 proper procedures. And I think that proper procedure goes  
4 through the chain of command. Then he says: If we cannot  
5 correct it, then we -- ultimately, if I feel that it needs to  
6 get to the council, then I will get it to them.

7 And then: So you, as city manager, will raise the  
8 concerns. Interesting question. It doesn't say you, as city  
9 manager, will arrange for David Davis to get to the council. It  
10 says so you, as city manager, will raise the concerns. He  
11 says: Yes. The bottom line, even on a work session or whatever  
12 comes before the council or whomever. It's a very structured  
13 form of government.

14 The defendant has the burden of proof of establishing  
15 that under their policies and procedures, Mr. Davis could have  
16 gotten to the city council or individual council members by  
17 going through the chain of command. The document, ASOP 12, is  
18 vague, at best. Chief Hunter, Mr. Roberts, when they were  
19 deposed back in April of '07, they both said that's a place you  
20 don't get to because it stops at the city manager. Suddenly now  
21 "stop" doesn't mean stop.

22 Now, there's a reference that I guess we need to  
23 discuss because it was brought up, and it's kind of been an  
24 important issue in the case. And that's the issue of the  
25 mayor's open-door policy. Now, the mayor admitted that he had

1 an open-door policy, so that's not an issue in dispute anymore.

2           Yesterday -- did you notice? This was something really  
3 interesting. Yesterday the defense put a witness on the stand  
4 to tell you that the gentleman who had his retirement party that  
5 the mayor spoke at, that he retired back in 2004. And they just  
6 left it at that. Now, why did they do that? They wanted to  
7 leave in your mind the impression that this couldn't have  
8 happened for -- after the mayor was elected and that everybody  
9 who stood up here and talked about it wasn't telling you the  
10 truth. That's why they left that fact out there.

11           But what did you learn today? It's been stipulated by  
12 the parties that that retirement dinner or meeting occurred in  
13 January 2005, back when the mayor was in office. They were  
14 trying to get one over on you on that, make you believe that it  
15 couldn't have happened when the witnesses said it happened. But  
16 now you know and have to accept as a stipulated fact that it did  
17 happen after the mayor got into office, just like the witnesses  
18 that we put on told you.

19           Now, in a -- there's this issue that we need to address  
20 concerning prior discipline, if we want to call it discipline.  
21 And Mr. McKoon and Chief Hunter went through the lists on that  
22 document and section. You know, they even included the "give me  
23 25 push-ups." That doesn't sound like such a horrible thing to  
24 me; but apparently, the department can't run if somebody, in  
25 jest, says give me 25. But they talk about all of these things,

1 and yet they're trying to paint a picture that they didn't do  
2 this because of the phone call.

3           The Court is going to instruct you otherwise. The  
4 Court is going to instruct you that the phone call was a  
5 substantial or motivating factor. It doesn't have to be the  
6 only factor, but it was a substantial or motivating factor. And  
7 it's not just the Court that's telling you that. Chief Hunter  
8 testified -- Chief Hunter testified that the second group II  
9 offense that Mr. Davis was charged with was the phone call to  
10 the mayor. Chief Hunter testified that the first group III  
11 offense that Mr. Davis was charged with was the phone call to  
12 the mayor. And yesterday, the last witness that they put on,  
13 Chief Waters, very candidly admitted that if David had not --  
14 excuse me -- Mr. Davis had not phoned the mayor on April 17th,  
15 2006, he wouldn't have been fired. And that's just a basic fact  
16 of this case. They may not like it, they may not be comfortable  
17 with it, but that's a basic fact of the case.

18           Now, in looking for the reasons for the termination, I  
19 think here's something that you should also keep in mind when  
20 judging the credibility of the various witnesses and deciding  
21 for yourself what really happened. I'm sure you picked up on  
22 this, but it's kind of an interesting thing I've never seen in  
23 one of these cases.

24           Chief Hunter got up there and told you -- and it makes  
25 perfect sense -- he recommends termination. He doesn't approve



1 termination. And he told you with respect to Mr. Davis that he  
2 recommended Mr. Davis's termination, but chief -- City Manager  
3 Roberts was the one who approved it prior to Mr. Davis being  
4 terminated. So he pointed the finger at the city manager, which  
5 kind of made sense to me. But then the city manager gets on the  
6 stand; and he said, I didn't approve the termination until after  
7 the appeal board hearing. I delegated that discretion to my  
8 department heads.

9           So what are you left with as a jury trying to figure  
10 out what really happened here? Chief Hunter told you he didn't  
11 terminate David Davis. City Manager Roberts told you that he  
12 didn't terminate David Davis. Who did? We don't know. But we  
13 know he was terminated, and nobody on that side seems to want to  
14 take the blame for it anymore.

15           When they talk about taking responsibility, let's talk  
16 about responsibility for their actions. Responsibility for  
17 their actions in the scope of this lawsuit brings us to the  
18 issue of damages. And the damages in this case, as was  
19 mentioned during the trial, have been stipulated with respect to  
20 actual out-of-pocket damages, and it's \$3756.88. And as  
21 Mr. Davis told you, this case wasn't about \$3700. That's not  
22 what the case is about. The case is about for calling the mayor  
23 on his own free time, this man lost not just his job, he lost  
24 his career for calling the mayor and he suffered greatly for it.

25           You've heard him testify how much his career meant to

1 him in this department, that this was the department that he  
2 always wanted to work in. This is the area where he grew up.  
3 These are the people that he wanted to serve and did serve for  
4 over eight years. This man was crushed when he lost that, when  
5 it was taken away from him for doing something that he thought  
6 he had the right to do. Responsibility for that action is  
7 something that should lay squarely at the feet of the city on  
8 this.

9           Now, \$3700? Why was that the case? Because Mr. Davis  
10 went out and got not just one, but got two full-time jobs to try  
11 to make up financially what he lost and support his family. And  
12 it required him to work these two jobs, 106 hours, an average of  
13 106 hours in a week. Now, I don't know about any of you, but  
14 106 hours a week, that's a lot hours. And I don't care if  
15 there's, you know, an ability to sleep once in a while at night  
16 when you're not on a run for a call. That's 106 hours away from  
17 home. It's impacted him. It's worn him out. And both his  
18 grandmother and his wife testified it's impacted the family.  
19 How could it not? They see him suffer. You have loved ones.  
20 Is it any surprise that Brenda Davis said it hurts her to watch  
21 him hurt? Should anyone be surprised by that?

22           So we get to the point that's probably the least  
23 comfortable part of the whole thing; and that's where, you know,  
24 I have to suggest to you what damages amount would be  
25 appropriate for Mr. Davis. Now, the Judge will instruct you on

1 the law on this. And that's where your instructions will come  
2 from, and those are the instructions you'll need to follow. And  
3 the Judge will instruct you that in addition to out-of-pocket  
4 expenses for lost income and such, that if you find it  
5 appropriate, you as the jury can compensate Mr. Davis for the  
6 emotional pain and suffering and anguish that he suffered  
7 because they took his career away from him.

8 Now, the amount of money that you would award him for  
9 that, how do you figure that out? You know, there's no formula  
10 for it. I can't stand up here with a chart and tell you what's  
11 compensation for pain and anguish. All I can do is this. What  
12 we ask is that you consider awarding Mr. Davis \$500,000 for pain  
13 and suffering and the anguish he went through and that you've  
14 heard on the stand. But ultimately, that judgment is left up to  
15 you. And it's going to be in your discretion to determine the  
16 amount that you would think is appropriate if you find that  
17 Mr. Davis is entitled to damages.

18 And we trust that when you get to that stage and it's  
19 time to consider, that you're going to follow the Judge's  
20 rules. You're going to remember what Mr. Davis said as well as  
21 his wife and his grandmother, and you'll come up with a number  
22 that you believe is right. And that's what the Court is going  
23 to ask you to do, and that's what we ask you to do.

24 Thank you very much for your time.

25 THE COURT: Let's take a brief recess before we

1 conclude closing arguments and I instruct you on the law. We'll  
2 take ten minutes. Don't begin discussing the case yet. We'll  
3 take a ten-minute recess and we'll start back at 25 minutes till  
4 three.

5 (Jury out at 2:24 p.m.)

6 THE COURT: Court is in recess.

7 (Recess at 2:24 p.m. until 2:36 p.m.)

8 (Chambers conference held off the record, after which  
9 proceedings reconvened in open court with the jury present,  
10 as follows:)

11 THE CLERK: Court is in session. You may be seated.

12 THE COURT: Mr. McKoon.

13 MR. MCKOON: Thank you, Your Honor. Ladies and  
14 gentlemen, I promise I won't be too long this time. This is my  
15 time to respond to some of the things that were said by  
16 Mr. Steele, and I intend to do that.

17 I thought that when the plaintiff took the witness  
18 stand in this case, there were two things that I remember very  
19 clearly. One was the only reason I was fired was because I made  
20 a phone call to the mayor. I believe that's what his testimony  
21 was. I believe that's what you were told in opening statement.  
22 Now, if you remember that different, then that's fine. But I  
23 believe that's what the testimony was.

24 That was not the only reason, and we've gone over those  
25 reasons with you. Substantial motivating factor, that's fine.

1 That was not the only reason. And had it been the only thing he  
2 had done, like I told you earlier, it wouldn't have resulted in  
3 a termination. It's kind of like your driver's license, you  
4 know? Once you get over 12 points, you lose it. You get chance  
5 and chance and chance and then, boom, that's it. Now, how many  
6 more chances is he supposed to get?

7 I also thought the plaintiff said, all I want is my job  
8 back. Do y'all remember that? All I want is my job back.  
9 Apparently he wants a half a million dollars. That's what he  
10 says he wants now. For what? Where is his damages? He took a  
11 job at Care Ambulance making more per hour than he was making at  
12 the fire department. He claims he works all these hours every  
13 week. And like I told you, I'm not denigrating the job, but a  
14 lot of this job on both counts is sleeping and eating and  
15 hanging around. It really is. And I hate to say that, but it's  
16 a fact. And so, you know, that's just the way it is.

17 And, you know, like I said, I'm kind of a bottom-line  
18 person. When he said, oh, Mr. McKoon used these buzz words like  
19 "Nazi" and all, what's the implication here? What's the  
20 implication here? Don't imply stuff; just tell me the facts,  
21 you know?

22 Just like you're going to bring in three witnesses and  
23 call me like I'm doing something unfair to people. Just call me  
24 a crook. And so I -- that's the reason I asked that question.  
25 Mr. Pitts, do you think I'm a crook? Object. No. No. No,

1 sir, I don't think that. You've been fair with me. You've been  
2 fair with everybody in here.

3 Wallace Hunter has been fair with all of these folks  
4 every time. They came in here with three witnesses from the  
5 fire department to testify, supposedly, about one thing. And  
6 the one thing was to say that the mayor had an open-door  
7 policy. We spent about an hour and a half, two hours, listening  
8 to those people. The mayor had just left the witness stand  
9 saying the same thing. What did they add to that? What was the  
10 real purpose of calling those folks?

11 I've got two young lawyers sitting over here. One of  
12 them is my son and the other one is a boy I've known since he  
13 was five years old. And I hope they'll learn something from me  
14 and the way I conduct myself, and I don't like being slammed by  
15 people. I don't think it's fair, and I don't think it's right.

16 And he can say, oh, the whole fire department will just  
17 fall apart because poor Mr. Davis is looking out the window.  
18 Well, you know what? My daddy always taught me to look people  
19 in the eye when they talked to me, you know? The one thing he  
20 did teach me was how to work. I worked in a grocery store when  
21 I came up. We were open seven to nine Monday through Sunday --  
22 through Saturday and seven to seven on Sunday, and he took off  
23 Christmas. There is many a day when I look back and think about  
24 how hard that was and I think, you know, those were the happiest  
25 days of my life. Because he left me with one thing, and that

1 was work and to respect the people who give you a job. Because  
2 the best thing you can do for a person is give them meaningful  
3 work. That is the very best thing you can do for them. And if  
4 you do that for a person, then the least thing they can do to  
5 you is give you some modicum of loyalty, you know, and respect.

6 That's all Wallace Hunter was looking for. That's all  
7 this policy is about. And we can get lawyers from Washington,  
8 D.C., to come down here and ask about merit system and ask about  
9 this and take things out of context and put it out and do all  
10 that. You shouldn't have to have a law degree to fire  
11 somebody. It shouldn't be like that, but that's what we've come  
12 to in America now. Want to wrap up in the First Amendment when  
13 basically you're going around being a bully to people and  
14 threatening them and undermining them every chance you get?

15 He wants to talk about disruption. Look at -- look at  
16 that -- look at that newspaper article. Read the whole thing  
17 from beginning to end. Chief Hunter had no -- no opportunity to  
18 do anything except respond to a newspaper article; reporters  
19 calling up, oh, we met with some of your firefighters. And let  
20 me tell you what. There's a newspaper reporter sitting out here  
21 today taking all this down. He's probably hoping we're going to  
22 lose because he can sell more newspapers. That's just a fact.  
23 So you want to talk about using terms like "Nazi" and "crook"  
24 and that kind of stuff? Let's just -- let's just lay it out  
25 there. Don't slide around and imply stuff.

1           Mr. Woodley was the guy who asked all these questions.  
2 I didn't know these lawyers till this week, but I know them now.

3           Now, I'm fixing to get back to this just a minute. And  
4 I apologize if I got a little emotional about that, but -- but,  
5 you know, I'm going to tell you something. There's a word  
6 that's -- you know, there's this movie out -- and I didn't go  
7 see it, but I did read the book -- called *No Country For Old*  
8 *Men*. I don't like to watch violent stuff. And sometimes I look  
9 around in the country and I think, this ain't no country for me  
10 anymore because people are not doing like they're supposed to be  
11 doing anymore. You know, people don't think about, you know,  
12 you've got to work hard. I try to hire some people sometimes,  
13 and they don't have enough sense to answer the telephone.  
14 Nobody's taught them anything. They don't know how to respect  
15 people, how to dress, how to do anything.

16           You know, you say, well, what's that got to do with all  
17 this? What it has to do with is this real simple fact. If  
18 somebody's going to give you a job and give you a task and  
19 you're going to do it, then do it with this word, honor.  
20 Remember that word? H-O-N-O-R. Be an honorable person. Be an  
21 up-front person. You know, if Mr. Davis doesn't like something,  
22 come to the person he's got the problem with and talk to them  
23 about it. Don't go over and whisper it to somebody else and  
24 whisper it to somebody else.

25           And let me tell you something. If you go through that



1 Exhibit #4 and you look at that stuff, you will see that some of  
2 his own members of the union are misled about that meeting.  
3 They went out there expecting a union meeting, and some of them  
4 didn't even know a reporter was going to be there. And the  
5 other ones, the purpose of a meeting was told to them, so we can  
6 talk to the newspaper. Now, that's just being dishonest, in my  
7 opinion. That's all that is, all that is. And I don't think  
8 people ought to be rewarded for bad behavior and dishonesty. I  
9 don't think so.

10 This stuff about he's lost his career. He's a  
11 firefighter for the Opelika Fire Department. Is that not a  
12 career? Is there something wrong with that career? It's the  
13 same career he had. Say, well, oh, now I'm not as far up in  
14 rank and all that. Well, whose fault is that, you know?

15 The question that you're going to have is have the  
16 defendants -- that the defendants have proved that the  
17 plaintiff's telephone call to Mayor Hardin was a violation of  
18 ASOP 12. Okay. Well, it's just real, real simple. If you go  
19 up ASOP 12 and just look at it -- and you've looked at it ad  
20 nauseam now till you're probably sick of it. But if you look at  
21 this, it just says if it finds -- a member of the fire  
22 department finds it necessary to go outside the fire  
23 department -- that means to anybody; that means to the media, to  
24 the Legislature, to anybody outside the fire department -- he's  
25 got to come up the chain of command. It's just that simple.

1           Mr. Davis never did any of this. He never did any of  
2 this. He never complied with this. And he's got excuse after  
3 excuse as to why he didn't do it, but the truth of the matter is  
4 it's just excuses. When people do the kind of things he does on  
5 a systematic basis, what it is, it's -- oh, the 25 push-ups;  
6 that's not a big deal. That's telling somebody to do  
7 something. Bullying around Brannon Wilkinson, trying to get him  
8 to come in with him; that -- that's not a big deal. Showing  
9 disrespect to a superior officer and threatening them and  
10 abusing them; that's not a big deal. That's not going to ruin  
11 the fire department. Not following the chain of command; that's  
12 not a big deal. That's not going to ruin the fire department.  
13 Well, I don't need a lawyer from Washington, D.C., to come down  
14 here and tell the Phenix City people how to run the fire  
15 department, you know? You can't work with people like that.  
16 You just can't do it.

17           And I don't know -- you know, let me just tell you  
18 something. This is an important case. This case has worried  
19 me. And the reason it's worried me is this, is because if you  
20 find a verdict in his favor in this case, it's going to be like  
21 injecting a cancer cell back into that department. All three of  
22 those people who came in here and said what they had to say  
23 about the department, every one of them said, well, the  
24 department is doing good now. Do you think that's a  
25 coincidence? Do you think that's a coincidence? Of course it

1 isn't.

2           This is an important case. And you're important  
3 people, because not everybody you could put on a jury would be  
4 smart enough to go through these questions and answer them. Not  
5 everybody you put on a jury would be smart enough to understand  
6 this situation. I don't know how much -- you know, I look  
7 around here and look at the ages of people and look at your  
8 particular experiences and all you've done. And I've got to say  
9 to myself, there's probably, what, 300 years of experience  
10 between you of some kind. Most of you have had a work life  
11 somewhere. You've had to answer to superiors. You've had  
12 people working under you. You know how it is when you've got  
13 somebody that's an irritant all the time, that's trying to  
14 disrupt things. You can't always put your finger right on it,  
15 you know, but they're doing it. And they're not going to be  
16 happy until they keep everybody else miserable.

17           Look at what his own people had to say. Read that --  
18 read through that #4 there. And he wants to talk about them not  
19 coming up here? They could have subpoenaed anybody they wanted  
20 to to come in here. But you know what? I was very happy with  
21 what they said. All they did was tell the truth. They wrote it  
22 out. What more do you want them to do?

23           So I want you to look at these questions. And here's  
24 what I'm going to urge you to do. I'm going to urge you to do  
25 this. If you want to, take that newspaper article and read

1 every bit of it. You decide whether that newspaper article was  
2 disruptive or not. You decide that, okay? Look at those things  
3 in Exhibit #4. See if that helped the fire department doing  
4 what he did. If you don't think that was disruptive, then I --  
5 I need to go somewhere else. It's no country for me.

6           The second question, that the defendants have proved  
7 that under the policies and practices of Phenix City, a  
8 firefighter, after exhausting the internal chain of command of  
9 the Phenix City Fire Department could speak without obtaining  
10 prior permission to the following.

11           Let me tell you one other thing that I forgot and  
12 Mr. Graham reminded me of just a minute ago. And it was  
13 testified to; and that is, the media is at every council  
14 meeting. They have a cable TV station broadcast the whole thing  
15 every week. In addition to that, people from the newspaper are  
16 there. Every council meeting. If you go to the council, you're  
17 going to get to the media. And if you go outside the  
18 department, you're going to get to the media. That's what this  
19 is about.

20           Finally -- so your answer to both of the first two  
21 questions should be yes. And the last question is that the  
22 defendants have proved the telephone conversation between the  
23 plaintiff and Mayor Hardin concerning the proposed ordinance to  
24 extend probationary period for new firefighters disrupted or  
25 impeded the operations of the Phenix City Fire Department or had

1 a reasonable likelihood of disrupting it. We don't have to  
2 prove that it disrupted it, but that it would have or had a  
3 likelihood to do it.

4 Now, what happened here was the fire chief comes in and  
5 finds out this is happening. And it's like, here we go again.  
6 Here we go again. Here we go again with Mr. Davis, going around  
7 me again, not giving me a chance. David has had chance after  
8 chance after chance, Mr. Davis has. He's not had one chance  
9 (indicating Mr. Hunter). He was asked, what kind of  
10 relationship did he have with the fire chief? None. And yet  
11 the folks that came in here said he's a fair guy. He's a fair  
12 guy.

13 So the bottom line on all of it is this. I honestly  
14 and truly believe this is one of the most important cases I've  
15 ever handled in my life. And I -- and I earnestly implore you  
16 to go back and answer these first three questions all yes and  
17 let us go home. Let him go back to what he's doing now and let  
18 us go back to keep -- having a good fire department, because  
19 we're not trying to keep anybody from speaking. All we want  
20 them to do is talk to the people in charge first.

21 And we said that, like I said, on April the 20th,  
22 2006. It's been in the policy. I don't know what else to do.  
23 We're not perfect. You know, we're not perfect. I mean we've  
24 got -- we've probably got forms we could fill out better, things  
25 we could do different, all that kind of stuff, you know. I

1 don't know what else we could do, but there's nothing ever  
2 perfect. If you find a perfect organization, I hope you'll join  
3 it.

4 That's all I've really got to say. This stuff about  
5 damages, I mean I don't get it. You know, you come in here and  
6 say, well, I want my job back. I want my \$3800. Oh, and in  
7 addition, throw me in a half million dollars, you know. The  
8 lottery. Thank y'all.

9 THE COURT: All right. Members of the jury, under our  
10 procedure, the plaintiff's lawyer has an opportunity to speak to  
11 you one last time, but it's limited to nothing more than the  
12 issue of damages. He's not going to be allowed -- he knows  
13 this -- the procedures won't allow him to respond to any of the  
14 things that the defendants' lawyer just argued to you about  
15 answering the questions or anything. So don't take the fact  
16 that he doesn't answer to those -- respond to those things to  
17 mean he agrees with it. He's restricted to speaking only on the  
18 issue of damages, and he'll now have that opportunity to do so.

19 Mr. Steele.

20 MR. STEELE: Thank you, Your Honor.

21 On this issue of damages, there's an important thing  
22 for you to consider when you enter that jury room. You should  
23 remember what Mr. McKoon stood up here and said. He only said  
24 he wanted his job back; now he's looking for money. That  
25 probably left a question in your mind.

1           But when you go into that jury room and you see the  
2 instructions the Judge is going to give you and you look at the  
3 questions the Judge will ask you to answer, you'll learn that  
4 you don't have the power, unfortunately, as a jury -- you don't  
5 have the power to give him his job back. That's not within your  
6 authority. Mr. McKoon didn't tell you that. He wanted you to  
7 believe that somehow we weren't interested in his job. Of  
8 course we're interested in his job. You, as a jury, are not in  
9 a position to give that to us.

10           Now, in addition to that, somehow -- I'm not sure how  
11 this works out, but somehow the damages that Mr. Davis is  
12 entitled to are supposed to be reduced because I work in  
13 Washington, D.C. Now, I don't think for a minute that any of  
14 you are going to be fooled by that; but in case any of you want  
15 to know, I grew up in a small town called Baldwinsville, New  
16 York, a suburb of Syracuse. Is that relevant to the case? It's  
17 not. It's not any more relevant to the case than the movie that  
18 Mr. McKoon knows about or the fine associates that he has  
19 working for him. What's relevant here is that you now have in  
20 your hands a chance to do justice by awarding damages to  
21 Mr. Davis in an amount that you feel is appropriate.

22           You know, there's a phrase that probably you should  
23 keep in mind when you're thinking about how Mr. Davis was  
24 harmed. You heard this phrase come from Mr. McKoon several  
25 times this week. And it was, lawsuits come and go; lawsuits

1 come and go, but careers matter. Well, Mr. Davis's career  
2 mattered to him in Phenix City, and he told you how hurt he was  
3 to lose it when he didn't think he did anything wrong.

4 Now, I'm not going to talk about -- any more about the  
5 amount of damages. We talked about that already. And the  
6 instructions are going to tell you as a group to consider all  
7 the facts, to consider your common knowledge, and to award an  
8 amount that you feel is right. And that's all we can ask of  
9 anybody. We trust in you to do the right thing. Thank you very  
10 much.

11 THE COURT: All right. Ladies and gentlemen, I'm going  
12 to instruct you on the law at this time. And it's in writing so  
13 that you'll have something to take back to the jury room with  
14 you, and I'll send this back with you. But I'll ask you to  
15 listen carefully as I instruct you on the matters of law.

16 Now that you've heard all the evidence and argument on  
17 behalf of the parties, it becomes my duty to give you the  
18 instructions of the Court concerning the law applicable to this  
19 case. It is your duty to follow the law whether or not you  
20 agree with it. It is then your duty to determine the facts and  
21 apply the law to those facts.

22 In deciding the facts of this case, you must not be  
23 swayed by prejudice or favor as to any party. Our system of law  
24 does not permit jurors to be governed by prejudice or sympathy  
25 or public opinion.



1           The fact that a governmental entity is involved as a  
2 party must not affect your decision in any way. A governmental  
3 entity and all other persons stand equal before the law and must  
4 be dealt with as equals in a court of justice. When a  
5 governmental entity is involved, of course, it may act only  
6 through people as its employees or officials. And in general, a  
7 governmental agency is responsible under the law for any of the  
8 acts and statements of its employees or officials that are made  
9 within the scope of their duties as employees or officials of  
10 that governmental agency.

11           All the parties and the public expect that you will  
12 carefully and impartially consider all the evidence in this  
13 case, follow the law as stated by the Court, and reach a just  
14 verdict, according to the evidence and the law. This was the  
15 oath you took and the promise you gave when you were selected as  
16 jurors. When you are true to this oath, you move us closer to  
17 our ideal of equal justice under law, closer to our aim to make  
18 the courthouse a temple of justice.

19           As stated earlier, it is your duty to determine the  
20 facts. And in so doing, you must consider only the evidence  
21 that has been admitted in the case. The term "evidence"  
22 includes the sworn testimony of the witnesses, stipulations of  
23 the parties, and the exhibits admitted in the record. As you  
24 consider the evidence, both direct and circumstantial, you may  
25 make deductions and reach conclusions which reason and common

1 sense lead you to make.

2 Direct evidence is the testimony of one who asserts  
3 actual knowledge of a fact, such as an eyewitness.

4 Circumstantial evidence is proof of a chain of facts and  
5 circumstances tending to prove or disprove any fact in dispute.  
6 The law makes no distinction between the weight you may give to  
7 either direct or circumstantial evidence.

8 Remember that any statements, objections, or arguments  
9 made by the lawyers or by any party while not under oath are not  
10 evidence in the case. It is your own recollection and  
11 interpretation of the evidence that controls in the case. What  
12 the lawyers say is not binding upon you. And except for my  
13 instructions to you on the law, you should disregard anything  
14 that I may have said during the trial in arriving at your  
15 decision as to the facts.

16 Now, in saying that you must consider all the evidence,  
17 I do not mean that you must accept all the evidence as true or  
18 accurate. You should decide whether you believe what each  
19 witness had to say and how important that testimony was. In  
20 making that decision, you may believe or disbelieve any witness  
21 in whole or in part. Also, the number of witnesses testifying  
22 concerning any particular dispute is not controlling.

23 In deciding whether you believe any witness, I suggest  
24 that you ask yourself a few questions. Did the witness impress  
25 you as one who was telling the truth? Did the witness have any

1 reason not to tell the truth? Did the witness have any personal  
2 interest in the outcome of the case? Did the witness seem to  
3 have a good memory? Did the witness have the opportunity and  
4 ability to observe accurately the things he or she testified  
5 about? Did the witness appear to understand the questions  
6 clearly and answer them directly? Did the witness's testimony  
7 differ from other testimony or evidence? You may accept or  
8 reject the testimony of any witness in whole or in part.

9           You should ask yourself whether there was evidence  
10 tending to prove that the witness testified falsely concerning  
11 some important fact or whether there was evidence that at some  
12 other time the witness said or did something or failed to say or  
13 do something which was different from the testimony the witness  
14 gave before you during the trial.

15           You should keep in mind, of course, that a simple  
16 mistake by a witness does not necessarily mean that the witness  
17 was not telling the truth as he or she remembered it because  
18 people naturally tend to forget some things and remember other  
19 things inaccurately. So if a witness has made a misstatement,  
20 you need to consider whether that misstatement was simply an  
21 innocent lapse of memory or an intentional falsehood. And the  
22 significance of that may depend on whether it has to do with an  
23 important fact or only an unimportant detail.

24           In a civil action such as this, the plaintiff has the  
25 burden of proving every essential element of his claim by a

1 preponderance of the evidence; and the defendants have the  
2 burden of proving every essential element of their affirmative  
3 defenses by a preponderance of the evidence. This is sometimes  
4 called the burden of proof or the burden of persuasion.

5           A preponderance of the evidence simply means an amount  
6 of evidence that is enough to persuade you that the claim or  
7 defense is more likely true than not true. In deciding whether  
8 any fact has been proved by a preponderance of the evidence, you  
9 may consider the testimony of all the witnesses regardless of  
10 who may have called them and all the exhibits received in  
11 evidence regardless of who may have produced them.

12           Up until this point, I've been stating general  
13 principles of law which apply to any civil jury trial. I'll now  
14 instruct you on the law that is particularly applicable to this  
15 case. This involves a claim of a constitutional violation.  
16 This is the constitutional violation asserted by the plaintiff.  
17 In this case, the plaintiff, David Davis, claims that the  
18 defendants, Phenix City, Alabama, and H. H. Roberts and Wallace  
19 Hunter in their official capacities as city manager and fire  
20 chief, respectively, intentionally deprived the plaintiff of his  
21 rights of free speech under the Constitution of the United  
22 States. The law provides that a person may sue in this court  
23 for an award of money damages against anyone who, under color of  
24 any state law or custom, intentionally violates the plaintiff's  
25 rights under the Constitution of the United States. In this

1 case, the parties have stipulated or agreed that the defendants  
2 acted under color of state law, and you should, therefore,  
3 accept that fact as proved.

4           The plaintiff claims that the defendants intentionally  
5 violated the plaintiff's constitutional right to freedom of  
6 speech by terminating him when he directly contacted Mayor  
7 Hardin about a proposed city ordinance which would extend the  
8 probationary period for new hires in the fire department. The  
9 plaintiff contends that this violated his right of free speech  
10 under the First Amendment to the Constitution of the United  
11 States. The defendants deny that they violated the plaintiff's  
12 rights in any way and assert that the plaintiff could have used  
13 less disruptive channels through the chain of command in  
14 accordance with city and departmental policy.

15           This is the -- what the plaintiff claims in his First  
16 Amendment free speech claim. Under the First Amendment to the  
17 Constitution of the United States, every public employee has the  
18 right to freedom of speech addressing issues of public concern.  
19 In this case, the plaintiff contacted Mayor Hardin concerning a  
20 proposal to extend the probationary period for new firefighters  
21 from one year to 18 months. You are instructed that this speech  
22 activity by the plaintiff was on a matter of public concern.

23           Also, the evidence establishes that the fact that the  
24 plaintiff made contact with Mayor Hardin was a substantial or  
25 motivating factor in his being terminated. So you need not --

1 those two things are not an issue in the case for you to decide.  
2 Generally, a public employee cannot legally be terminated from  
3 employment if his exercise of First Amendment rights in  
4 discussing the subject of public concern was a substantial or  
5 motivating factor, even if there were other reasons that played  
6 a part in his being terminated.

7 But now, the defendants have defenses to that. And as  
8 a defense to this claim, they say that because the plaintiff was  
9 a firefighter, the Phenix City merit system rules and the fire  
10 department administrative standard operating procedures properly  
11 placed a restriction on his speech that does not apply to  
12 average public employees; that is, a requirement that the  
13 plaintiff first go through an internal chain of command before  
14 speaking outside the fire department. What I'm telling you now  
15 are in the nature of affirmative defenses, claims that the  
16 defendants make that they have the burden of proof on.

17 It's the defendants' further contention, however, that  
18 under the Phenix City merit system rules and Phenix City Fire  
19 Department's administrative standard operating procedures, the  
20 plaintiff could speak to the city council, to the mayor and  
21 council members individually, and to the media without obtaining  
22 the defendants' permission about the proposal to extend the  
23 probationary period for new firefighters if he had first  
24 exhausted the internal chain of command, but that the plaintiff  
25 failed to do so. And the defendants say that the plaintiff's

1 speaking to Mayor Hardin about this when he did was a violation  
2 of what's been referred to as ASOP 12.

3           Therefore, you're going to be asked to answer several  
4 questions when you retire to the jury room on these issues.  
5 This will be called special interrogatories to the jury; but in  
6 effect, this will be your verdict. I'm going to ask the clerk  
7 to pass out to you, each of you, copies of this form that you'll  
8 have, and then I'm going to talk to you about how this operates  
9 on what you're to decide.

10           (Brief pause)

11           THE COURT: Now, these questions on the first page have  
12 to do with the defendants' affirmative defenses, which they have  
13 the burden of proving by a preponderance of the evidence. So  
14 each of these questions -- and I'm going through each one of  
15 them with you. Each one of them is prefaced by the question, Do  
16 you find by a preponderance of the evidence. And I explained to  
17 you what that meant.

18           All right. First, do you find by a preponderance of  
19 the evidence that the defendants have proved that the  
20 plaintiff's telephone call to Mayor Hardin was a violation of  
21 ASOP 12? You answer that question yes or no.

22           Then you go to question two. And question two would  
23 be: Do you find by a preponderance of the evidence that the  
24 defendants have proved that under the policies and practices of  
25 Phenix City, a firefighter, after exhausting the internal chain

1 of command in the Phenix City Fire Department, could speak  
2 without obtaining prior permission to the following? And you  
3 answer that as to each of three different things. First, to the  
4 city council, yes or no; second, to Mayor Hardin or other city  
5 council members individually, you answer yes or no; and third,  
6 to the media, you answer yes or no.

7 Then you go to question three. And that is: Do you  
8 find by a preponderance of the evidence that the defendants have  
9 proved that the telephone conversation between the plaintiff and  
10 Mayor Hardin concerning the proposed ordinance to extend the  
11 probationary period for new firefighters disrupted or impeded  
12 the operation of the Phenix City Fire Department or had a  
13 reasonable likelihood of disrupting or impeding the operations  
14 of the Phenix City Fire Department? And you answer that yes or  
15 no.

16 Now, at the top of the second page, this has another  
17 one. It says if you answered yes to all of those questions on  
18 the first page, then you need not go to question four. If  
19 everything on the first page has been answered yes, you go on --  
20 you're through. You go down and have your foreperson sign it  
21 and date it, and we'll have you return to the courtroom.

22 However, if you did not answer all questions on the  
23 first page yes, then you go to question four. And that is, that  
24 the plaintiff has proven by a preponderance of the evidence that  
25 he suffered damages as a result of the defendants' actions in



1 discharging the plaintiff from his employment with the Phenix  
2 City Fire Department. Yes or no. If you answer that yes, then  
3 you go to question number three, which says in what amount. And  
4 I'll talk to you about that in just a moment.

5           Before getting to that, I want to explain to you the  
6 law on damages. And if you answer the questions in the manner I  
7 just discussed with you so that you're called on to address the  
8 plaintiff's damages, then you must decide the issue of  
9 plaintiff's damages. And I'll now instruct you on the law of  
10 damages.

11           For damages to be the proximate or legal result of  
12 wrongful conduct, it must be shown that except for such conduct,  
13 the damages would not have occurred. In considering the issue  
14 of the plaintiff's damages, you are instructed that you should  
15 assess the amount you find to be justified by a preponderance of  
16 the evidence as full, just, and reasonable compensation for all  
17 of the plaintiff's damages, no more, no less.

18           Compensatory damages are not allowed as a punishment  
19 and must not be imposed or increased to penalize a defendant.  
20 Also, compensatory damages must not be based on speculation or  
21 guesswork, because it is only actual damages that are  
22 recoverable.

23           On the other hand, compensatory damages are not  
24 restricted to actual loss of time or money. They cover both the  
25 mental and physical aspects of the injury, tangible and

1 intangible. Thus, no evidence of the value of such intangible  
2 things as emotional pain and mental anguish has been or need to  
3 be introduced. In that respect, it is not value we're trying to  
4 determine, but an amount that will fairly compensate the  
5 plaintiff for all those claims of damages. There's no exact  
6 standard for fixing the compensation to be awarded on account of  
7 such elements of damages. Any such award should be fair and  
8 just in the light of the evidence.

9           So if you determine that there were damages and damages  
10 are to be awarded, you should consider the following elements of  
11 damage to the extent you find them proved by a preponderance of  
12 the evidence and no others. There are two elements of damage  
13 that you may then consider, net loss of wages and benefits and  
14 emotional pain and mental anguish.

15           Now, as to net lost wages and benefits to the date of  
16 trial, the parties have agreed that if the plaintiff is entitled  
17 to damages, that this amount of net lost wages and benefits  
18 would amount to \$3,756.88. And there's a stipulation before  
19 you. So you would put that amount in the blank if you find that  
20 damages should be awarded. The next blank is emotional pain and  
21 mental anguish. You should fill in the blank with an amount  
22 that you all agree to if you find that such damages should be  
23 awarded.

24           Of course, the fact that I've given you instructions  
25 concerning the issue of plaintiff's damages should not be

1 interpreted in any way as an indication of how I believe you  
2 should answer the questions in the special interrogatories to  
3 the jury.

4 Now, in conclusion, any verdict you reach in the jury  
5 room must be unanimous. In other words, to return a verdict,  
6 you must all agree. Your deliberations will be secret. You  
7 will never have to explain your verdict to anyone.

8 It is your duty as jurors to discuss the case with one  
9 another in an effort to reach agreement, if you can do so. Each  
10 of you must decide the case for yourself, but only after a full  
11 consideration of the evidence with the other members of the  
12 jury. While you're discussing the case, do not hesitate to  
13 reexamine your own opinion and change your mind if you become  
14 convinced that you were wrong. But do not give up your honest  
15 beliefs solely because the others think differently or merely to  
16 get the case over with. Remember that in a very real way, you  
17 are judges, judges of the facts. Your only interest is to seek  
18 the truth from the evidence in this case.

19 Upon retiring to the jury room, you first select one of  
20 your number to act as your foreperson, and that person will  
21 preside over your deliberations in the jury room and speak for  
22 you here in court. You will take the special interrogatories to  
23 the jury room with you. And when you've reached a unanimous  
24 agreement as to each interrogatory or question that you're  
25 called upon to answer, you will have your foreperson fill in the

1 answer. When you've unanimously agreed on each answer you are  
2 called upon to give, you will then have your foreperson date and  
3 sign the form, knock on the door, and the clerk -- the marshal  
4 will return you to the courtroom.

5           So when you first get back there, you elect a  
6 foreperson. That foreperson will take charge of your  
7 deliberations. Let the foreperson have the verdict form that  
8 will be the official verdict form, and the foreperson will have  
9 the jury charge that I send back with you. Also, you can take  
10 your notes back with you, and you can also take back your books  
11 with the forms of both the plaintiff's and the defendants'  
12 exhibits.

13           Now, if during the deliberations you should find it  
14 necessary to communicate with the Court -- that is, with me --  
15 put your message or question in writing signed by the foreperson  
16 and pass the note to the marshal, who will bring it to my  
17 attention. I will respond as promptly as possible, either in  
18 writing or by having you return to the courtroom so I can  
19 address you orally. This will have to be done in the presence  
20 of the parties and their attorneys. If you desire to  
21 communicate with me, do not indicate any numerical division of  
22 the jury.

23           Now, it's proper, I think, for me to add a final  
24 caution. Nothing that I've said in these instructions and  
25 nothing that I've said or done during the trial of this case has

1 been done to suggest to you what I think your verdict in the  
2 form of your answers to these special interrogatories should  
3 be. What your answers are will be your sole duty and your sole  
4 responsibility.

5 Now, at this time, it's necessary for me to talk to the  
6 lawyers for just a minute outside of your presence. Just be at  
7 ease there, and we'll be right back.

8 (Bench conference, as follows:)

9 THE COURT: What says the plaintiff? What says the  
10 plaintiff? Any objections?

11 MR. STEELE: No objections, Your Honor.

12 THE COURT: Defendants?

13 MR. MCKOON: Satisfied.

14 THE COURT: Thank you. All right.

15 (Bench conference concluded)

16 THE COURT: All right. Ladies and gentlemen, at this  
17 time, you'll be escorted into the jury room to begin your  
18 deliberations.

19 (Jury out at 3:17 p.m. to commence deliberations)

20 THE COURT: Court will be in recess.

21 (Recess at 3:18 p.m. until 4:39 p.m., at which time  
22 proceedings reconvened without the jury present, as  
23 follows:)

24 THE CLERK: Court is in session. You may be seated.

25 THE COURT: The jury knocked on the door and told the

1 marshal that they needed another jury verdict form because they  
2 messed up what they had. So I'm going to give the -- I'm going  
3 to give the courtroom deputy, the clerk, another copy of the  
4 special interrogatories and have her deliver that to the jury.  
5 Any comment from either side?

6 MR. STEELE: No objection, Your Honor.

7 MR. MCKOON: No, sir.

8 THE COURT: All right. Ms. Behrman, will you take that  
9 to them.

10 We'll be back in recess. I don't know what that means.

11 (Recess at 4:39 p.m. until 4:43 p.m., at which time  
12 proceedings reconvened without the jury present, as  
13 follows:)

14 THE CLERK: Court is in session. You may be seated.

15 THE COURT: All right. The jury has announced that it  
16 has a verdict. Bring the jury in.

17 (Jury in at 4:43 p.m.)

18 THE COURT: Be seated. Has the jury reached a verdict?

19 THE FOREPERSON: We have, Your Honor.

20 THE COURT: Hand it to the clerk, please.

21 Before I receive the verdict, I want to thank all of  
22 you for being here all this week. We've had some funny weather  
23 situations and we've had some delays, and I want to thank you on  
24 behalf of our Court and the citizens of the Middle District for  
25 serving on the jury this week.

1 Special interrogatories to the jury. Do you find by a  
2 preponderance of the evidence:

3 One, that the defendants have proved that the  
4 plaintiff's telephone call to Mayor Hardin was a violation of  
5 ASOP 12? Yes.

6 Two, that the defendants have proved that under the  
7 policies and practices of Phenix City, a firefighter, after  
8 exhausting the internal chain of command in the Phenix City Fire  
9 Department, could speak without obtaining prior permission to  
10 the following: The city council? Yes. Mayor Hardin and other  
11 city council members individually? Yes. The media? Yes.

12 Three, that the defendants have proved that the  
13 telephone conversation between the plaintiff and Mayor Hardin  
14 concerning the proposed ordinance to extend the probationary  
15 period for new firefighters disrupted or impeded the operations  
16 of the Phenix City Fire Department or had a reasonable  
17 likelihood of disrupting or impeding the operations of the  
18 Phenix City Fire Department? Yes.

19 Signed by Nadean -- and I'm sorry. I can't read the  
20 last -- Dalton?

21 THE FOREPERSON: Dalton. Yes, sir.

22 THE COURT: -- Dalton, Foreperson, March 6th, 2008.

23 Members of the jury, my question to you is are each of  
24 these answers your individual answer? And I'll go down the  
25 line, and answer yes or no.

1 THE FOREPERSON: Yes, sir.

2 JUROR: Yes, sir.

3 JUROR: Yes, sir.

4 JUROR: Yes, sir.

5 JUROR: Yes.

6 JUROR: Yes, sir.

7 JUROR: Yes.

8 JUROR: Yes, sir.

9 THE COURT: I'll enter a judgment in accordance with  
10 the factual findings. And at this time, with our thanks, you're  
11 excused.

12 (Jury out at 4:46 p.m.)

13 THE COURT: Be seated. Anything for the record before  
14 court is adjourned from the plaintiff?

15 MR. STEELE: No, Your Honor.

16 THE COURT: Defendants?

17 MR. MCKOON: No. No, sir.

18 THE COURT: I'll enter final judgment in accordance --  
19 or consistent with the factual findings determined by the jury.  
20 Court is adjourned.

21 MR. MCKOON: Thank you, Your Honor.

22 (Proceedings concluded at 4:47 p.m.)

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COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

This 16th day of May, 2008.

/s/ Risa L. Entrekin  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Official Court Reporter